(14,418.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 350.

JOHN HOBART WARREN, GEORGE A. WELLS, AND WALTER P. WARREN, SURVIVORS OF JOSEPH W. FULLER, DECEASED, APPELLANTS,

vs.

WILLIAM J. KEEP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Statement	1	1
Bill of complaint	3	1
Subpœna	18	8
Appearance for defendants	19	9
Answer	20	9
Replication	40	19
Interlocutory decree	41	19
Stipulation substituting Esek Cowen as solicitor for defendants	44	21
Order substituting Esek Cowen as solicitor for defendants	45	21
Master's report	46	22
Exceptions to master's report	56	27
Final decree	62	30
Evidence before the master	65	31
Testimony of William J. Keep	66	32
Walter P. Warren	88	46
L. W. Drake	97	51
Simon F. Mann	137	78

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 27, 1894.

	Original.	Print.
Testimony of Walter P. Warren (resumed)	145	83
Charles A. McLeod	182	106
L. W. Drake (recalled)	188	110
William J. Keep (recalled)	193	113
Freeman P. Lang	202	119
William J. Keep (resumed)	231	137
Philip M. Wales	249	148
Silas H. Brown	256	153
Walter P. Warren (recalled)	257	153
L. W. Drake (recalled)	265	158
Stipulation as to filing testimony and as to record on appeal	269	161
Opinion of Judge Coxe	270	161
Petition for and allowance of appeal	277	165
Bond	278	165
Citation	280	166
Proof of service of citation	281	167
Clerk's certificate	282	167

1 *Statement.*

Circuit Court of the United States, Northern District of New York.

WILLIAM J. KEEP
vs.
JOHN HOBART WARREN, JOSEPH W. FULLER, GEORGE A. WELLS, and WALTER P. WARREN. } In Equity. No. 3140.

Complainant in the above-entitled cause filed his bill of complaint, which is hereunto annexed, on the 14th day of March, 1881, and the writ of subpœna was thereupon issued.

An appearance was duly entered for the defendants by Gale & Alden, their solicitors, and on the 8th day of December, 1881, an answer to said bill of complaint was filed, the same being hereto annexed.

Thereafter and on the 8th day of December, 1881, the complainant filed his replication to said answer, the same being hereto annexed.

Testimony was thereafter taken by the respective parties, and on the 20th day of March, 1883, at a term of said court—present, the Honorable William J. Wallace, judge—the said cause came on to be heard on the pleadings and proofs, and on the same day a decree of said court was filed and entered in favor of complainant and for an accounting, which decree is hereunto annexed.

2 On the 17th day of June, 1889, John M. Landon, Esqr., one of the masters of this court, to whom it was referred to take and state said account, filed his report, which is hereunto annexed.

On the 29th day of June, 1889, the defendants filed exceptions to said master's report, which exceptions are hereunto annexed.

The said cause was again brought to a hearing upon the exceptions to said report at a term of this court, held at Canandaigua, on the 17th day of June, 1890—present, the Honorable Alfred C. Coxe, judge—and thereafter a decision was made on said exceptions and filed herein on the 14th day of July, 1890.

And thereafter, and on the 31st day of July, 1890, the said court caused its final decree to be made and entered herein, which final decree is hereto annexed.

3 *Bill of Complaint.*

United States Circuit Court for the Northern District of New York.

WILLIAM J. KEEP
vs.
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS, & WALTER P. WARREN, Defendants. } In Equity.

To the honorable the judges of said court:

William J. Keep, of Troy, in the State of New York & a citizen & resident of said State & said district, brings this bill of complaint

against Joseph W. Fuller, John Hobart Warren, George A. Wells, & Walter P. Warren, composing the firm of Fuller, Warren & Company, doing business in said city of Troy & State of New York, & all residents of said district and State; and thereupon your orator complains & states that heretofore and before the first day of June, 1869, said complainant, William J. Keep, was the original & first inventor of a new & useful improvement in cooking stoves not known or used before & not in public use or on sale for two years prior to his application for letters patent therefor, as hereinafter stated; that being such inventor the said Keep duly made application in writing to the Commissioner of Patents of the United States for granting of letters patent for said invention in accordance with the then existing acts of Congress, & that thereafter, & after due proceedings had thereon, & having fully & in all respects
4 complied with the acts of Congress in such case made and provided, such proceedings were had thereon that, on the first day of June, 1869, letters patent of the United States, bearing date on that day & numbered No. 90756, were duly issued & delivered to said complainant, William J. Keep, which letters patent were issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then acting Secretary of the Interior & countersigned by the then Commissioner of Patents & duly recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, his heirs, executors, administrators, & assigns the sole & exclusive right to make, use, & vend the said invention for the term of seventeen years from the date thereof, a description whereof was given in the schedule annexed to said letters patent & making part thereof, as by said letters patent or a certified copy thereof ready in court to be produced will more fully & at large appear.

And your orator further shows that prior to June first, 1869, he was the original & first inventor of a new & useful improvement in cooking stoves not known or used before & not in public use or on sale for two years prior to his application for letters patent therefor, as hereinafter stated; that being such inventor your said orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention in accordance with the then existing acts of Congress, & that thereafter & after due proceedings had thereon, & having in all respects complied with all the acts of Congress
5 in such case made & provided, such proceedings were thereupon had that, on the first day of June, 1869, letters patent of the United States, bearing date on that day & numbered No. 90850, were duly issued in the name of the United of America, were sealed with the seal of the Patent Office, were signed by the then acting Secretary of the Interior & countersigned by the then Commissioner of Patents, & were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, his heirs, executors, administrators, or assigns the sole & exclusive right to make, use, & vend the said invention for the term of seventeen years from the date thereof, a description whereof was given

in the schedule annexed to said letters patent & making part thereof, as by said letters patent or a certified copy thereof ready in court to be produced will at large & more fully appear.

And your orator further shows that prior to the 29th of March, 1870, he was the original & first inventor of a new and useful improvement in base-burning stoves not known or used before & not in public use or on sale for two years prior to his application for letters patent therefor, as hereinafter stated; that being such inventor your said orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention in accordance with the then existing acts of Congress, & that thereafter, & after due proceedings had thereon, & having in all respects complied with all the acts of Congress in
6 such case made & provided, such proceedings were thereupon had that, on the twenty-ninth day of March, 1870, letters patent of the United States, bearing date on that day & numbered No. 101,368, were duly issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then Secretary of the Interior, & countersigned by the then Commissioner of Patents, and were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, his heirs, executors, administrators, & assigns the sole & exlusive right to make, use, & vend the said invention for the term of seventeen years from the date thereof, as by said letters patent or a certified copy thereof ready in court to be produced will more fully & at large appear.

And your orator further shows that thereafter your orator for good & lawful cause, to wit, because the said letters patent were inoperative or invalid by reason of a defective or insufficient specification or by reason of the patentee having claimed as his own invention or discovery more than he had a right to claim as new, said error having arisen by inadvertence, accident, or mistake, & without any fraudulent or deceptive invention, surrendered said letters patent to the Commissioner of Patents, & prayed that new letters patent might be issued for the same invention on an amended specification & claims. And therefore, after due proceedings had been had & all the requirements of the statute & rules in such cases made & provided had been complied with, the Commissioner of
7 Patents caused new & amended letters patent to be issued & delivered to your orator, the said William J. Keep, bearing date the sixteenth day of May, 1871, numbered reissue No. 4386. & which are for the same invention as that described in said original letters patent, & grant, & secure to your orator, his heirs, executors, administrators, & assigns the sole & exclusive right to make, use, & vend the said invention for the residue of the term of seventeen years from the said twenty-ninth day of March, 1870, as by the said reissued letters patent number 4386 or a duly certified copy thereof in court to be produced will more fully & large appear, and your orator further shows that the entire title to said reissued letters patent aforesaid is now vested in your orator, & that he is

the original and first inventor of the invention described & claimed in said letters patent.

And your orator further shows that, prior to July 16, 1872, he, said William J. Keep, was the original & first inventor of a new & useful improvement in cooking stoves not known or used before & not in public use or on sale for over two years prior to his application for letters patent therefor as hereinafter stated; that being such inventor your said orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention in accordance with the then existing acts of Congress, & that thereafter, & after due proceedings had thereon, & having in all respects complied with the then existing acts of Congress in such case made & provided, such proceed-
8 ings were thereupon had that, on the 12th day of December, 1871, letters patent of the United States, bearing date on that day, & numbered number 121,676, were duly issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then acting Secretary of the Interior, & countersigned by the then Commissioner of Patents, and were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, said William J. Keep, his heirs, executors, administrators, & assigns, the sole & exclusive right to make, use & vend the said invention for the term of seventeen years from the date thereof, a description whereof was given in the schedule annexed to said letters patent & making a part thereof, as by said letters patent or a duly certified copy thereof ready in court to be produced will more fully & at large appear.

And your orator further shows that, prior to the sixteenth day of July, 1872, he, said William J. Keep, was the original & first inventor of a new and useful improvement in base-burning stoves not known or used before & not in public use or on sale for over two years prior to his application for letters patent therefor, as hereinafter stated; that being such inventor your orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention in accordance with the then existing acts of Congress, & that thereafter, & after due proceedings had thereon, & having in all respects complied with all the acts of Congress in such case
9 made & provided, such proceedings were had thereupon that, on the sixteeenth day of July, 1872, letters patent of the United States, bearing date on that day, & numbered number 123,348, were duly issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then Secretary of the Interior & countersigned by the then Commissioner of Patents, and were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, said William J. Keep, his heirs, executors, administrators, & assigns the sole & exclusive right to make, use, & vend the said invention for the term of seventeen years from the date thereof, a description whereof was given in the schedule annexed to said letters patent & forming a part thereof, as by said letters patent or

a duly certified copy thereof ready in court to be produced will more fully & at large appear.

And your orator further shows that, prior to June third, 1873, he, said William J. Keep, was the original & first inventor of a new & useful improvement in stove grates not known or used before & not in public use or on sale for more than two years prior to his application for a patent therefor as hereinafter stated; that being such inventor your said orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent of the United States for said invention in accordance with the then existing acts of Congress, & that thereafter, &
10 after due proceedings had thereon & having in all respects complied with all the acts of Congress in such case made & provided, such proceedings were thereupon had that, on the third day of June, 1873, letters patent of the United States, bearing date on that day, & numbered number 139,583, were duly issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then Secretary of the Interior, & were countersigned by the then Commissioner of Patents, & were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, said William J. Keep, his heirs, executors, administrators, & assigns the sole & exclusive right to make, use, & vend the said invention for the term of seventeen years from the date thereof, a description whereof was given in the schedule annexed to said letters patent & making a part thereof, as by said letters patent or a duly certified copy thereof ready in court to be produced will more fully and at large appear.

And your orator, said William J. Keep, further shows that prior to October fifth, 1875, he was the original & first inventor of a new & useful design for cooking stoves not known or used before & not in public use or on sale for more than two years prior to his application for letters patent therefore, as hereinafter stated; that being such inventor your said orator duly made application in writing to the Commissioner of Patents of the United States for the granting of letters patent of the United States for said invention
11 in accordance with the then existing acts of Congress, & that thereafter, & after due proceedings had thereon, & having in all respects complied with all the acts of Congress in such case made & provided, such proceedings were had thereupon that, on the fifth day of October, 1875, letters patent of the United States, bearing date on that day & numbered number 8635, were duly issued in the name of the United States of America, were sealed with the seal of the Patent Office, were signed by the then acting Secretary of Interior & countersigned by the then Commissioner of Patents, & were recorded in the Patent Office in a book kept for that purpose, whereby there was granted to your orator, his executors, heirs, administrators, or assigns, the sole & exclusive right to make, use, and vend the said invention for the term of seventeen years from the date thereof, a description whereof was given in the schedule annexed to said letters patent & making a part thereof, as

by said letters patent or a duly certified copy thereof ready in court to be produced will more fully & at large appear.

And your orator further shows that he has extensively applied the said several inventions to practical use, & that the exclusive right to the same has been recognized, respected, & acquiesced in by the trade and the public generally; that but for the infringements hereinafter complained of your orator would be in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by said seven letters patent & reissued letters patent & in re-
12 ceipt of the profits of the same.

And your orator further shows that as he is informed & believes the said defendants hereinbefore named & each of them, well knowing all the facts hereinbefore set forth & the rights secured to your orator as aforesaid, but contriving to injure your orator & to deprive him of the benefits & advantages which might accrue to him from the foregoing-mentioned inventions after the year 1869 or after the date of the said respective letter patent & before the commencement of this action within the northern district of New York & at other places in the United States, against the will of your orator & in violation of his rights and in infringement of the said before-mentioned seven letters patent and reissue letters patent made, used, & vended & are making, using, & vending the inventions set forth in the said before-mentioned seven letters patent & reissued letters patent and have made and sold a large number of cooking stoves, each one of which contained devices substantially the same in all respects as those described & claimed in the said letters patent No. 90756, and also during the same time & in the said northern district & other places in the United States made & sold a large number of the same & other cooking stoves, each one of which contained devices substantially the same in all respects as those described & claimed in the said letters patent number 90850, and also during the same time & in the said northern district of New York & at other places in the United States made & sold a large number of base-burning
13 stoves, also cooking stoves, each one of which contained devices substantially the same in all respects as those described & claimed in said reissued letters patent number 4386, and also during the same time & in the said northern district & in other places in the United States made & sold large numbers of cooking stoves, each one of which contained devices substantially the same in all respects as those described & claimed in said letters patent No. 121,676, and also during the same time & in said northern district & in other places in the United States made & sold a large number of base-burning and other stoves, each one of which contained devices substantially the same in all respects as those described & claimed in said letters patent number 139,583, and also during the same time & in said northern district of New York & in other places in the United States made & sold a large number of cooking stoves, each one of which contained devices substantially the same in all respects as those described & claimed in the said letters patent number 8635.

And your orator further shows that all of said stoves & grates so manufactured & sold by said defendants were in violation of the exclusive privileges granted to your orator under & by virtue of said letters patent & said reissued letters patent hereinbefore set forth & in infringement of said letters patent & said reissued letters patent & of the claims therein contained, but what quantities or numbers of said stoves & of said grates, made as hereinbefore
14 referred to, said defendants have made & sold your orator does not fully know & cannot accurately state, but upon information & belief aver- that they have made & sold large quantities & numbers of each of the same, & that they have derived & received from such manufacture & sale great gains & profits, but to what amount your orator cannot fully set forth, but your orator believes the same to be the full sum of fifty thousand dollars & so charges the fact to be & prays the defendants may be required to make disclosures of all such gains & profits.

And your orator further avers upon information & belief that said defendants continue to make & sell stoves & grates patented as aforesaid & refuse, though warned & requested, to desist from such manufacture & sale or to pay to your orator such gains & profits, by means whereof the said defendants have injured & are still injuring & depriving your orator of & have prevented & are still preventing your orator from receiving the gains & profits from the use of the exclusive rights to make & use the said inventions & improvements described & claimed in said several patents & said reissued letters patent hereinbefore set forth, which your orator would otherwise & but for the wrongful acts of said defendants have obtained & received.

Wherefore, to the end that said defendants may, if they can, show why your orator should not have the relief hereby prayed,
15 your orator prays that said defendants & each of them & every one of them may upon his oath & to the best of his knowledge, information, & belief full, true, & perfect answers make to all the matters & things hereinbefore set forth & charged, & that as fully & particularly as if the said matters were here again repeated & the defendants particularly interrogated thereto, & may be compelled to account & pay over to your orator the income & profits thus unlawfully derived from the violation of the rights of your orator & be restrained from any further violation of said rights.

And your orator prays that your honors may grant a writ of injunction restraining the defendants & each & every one of them & their and each of their servants, agents, clerks, attorneys, & workmen from hereafter making, vending, or using in any manner, directly or indirectly, the said patented inventions or either or any of them hereinbefore set forth, or any part thereof, in violation of the rights of your orator as aforesaid, & that all stoves & grates containing said patented invention or devices now in use or in the possession of the said defendants may be destroyed or delivered up to your orator for that purpose.

And also that your honors, upon the rendering of a decree for an injunction as above prayed for, may be pleased to assess or

cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orator has sustained by reason of such infringement by said defendants, & that your honors may increase the actual
16 damages so assessed under the circumstances of the wilful & unjust infringement of said defendants' rights as herein set forth.

May it please your honors to grant to your orator the writ of preliminary or provisional injunction against the defendants & each & every one of them & each & every one of their agents, servants, clerks, attorneys, & workmen, enjoining them & each & every one of them during the pendency of this suit from making, using, or selling the said invention or inventions or any one of them or any substantial part thereof, and may it please your honors to grant unto your orator, not only the writ of injunction above prayed for, but also the writ of subpœna of the United States of America, issuing out of & under the seal of this court, directed to the said defendants, Joseph W. Fuller, John Hobart Warren, George A. Wells, & Walter P. Warren, commanding them to appear & make answer to this bill of complaint & to perform & abide by such order, direction, & decree as may be made against them, & that your orator may have such other or further relief as well be equitable and just; and as in duty bound your orator will ever pray.

NELSON DAVENPORT,
Sol. & of Counsel for Complainant, Troy, N. Y.

17 UNITED STATES OF AMERICA, } ss:
Northern District of New York, Rensselaer County, }

William J. Keep, being duly sworn, says that he is the complainant above named; that he has read the foregoing complaint & knows the contents thereof, & that said complaint is true of his own knowledge except as to the matters therein stated to be alleged on information & belief, & as to those matters he believes it to be true.

W. J. KEEP.

Subscribed & sworn to before me this 10th day of March, 1881.
WM. H. HOLLISTER, JR.,
Notary Public.

Indorsed: Bill of complaint. Filed Mar. 14, 1881. William H. Bright, clerk.

18 *Writ of Subpœna.*

The President of the United States of America to Joseph W. Fuller, John Hobart Warren, George A. Wells, and Walter P. Warren, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States for the
[L. S.] northern district of New York, in the second circuit, on the first Monday in April, 1881, to answer to a bill of complaint

exhibited against you in said court by William J. Keep, and to do further and receive whatever said court shall have considered in that behalf, and this you are not to omit, under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Utica, in said northern district, the 14th day of March, eighteen hundred and eighty-one.

WILLIAM H. BRIGHT, *Clerk.*

N. DAVENPORT,
Solicitor for Complainant.

MEMORANDUM.—The defendant- *is* to enter *his* appearance in the suit above mentioned in the clerk's office, at Utica, on or before the day at which the above subpœna is returnable; otherwise the bill may be taken *pro confesso.*

WILLIAM H. BRIGHT, *Clerk.*

Indorsed: Equity subpœna. Filed Oct. 2, 1890. W. S. Doolittle, clerk.

19 *Appearance.*

Circuit Court of the United States, Northern District of New York, 2d Circuit.

WILLIAM J. KEEP
vs.
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS, & WALTER P. WARREN.

We hereby appear in above-entitled cause for the above-named defendants, and the clerk will please enter such appearance.

Troy, March 17, 1881.

GALE & ALDEN,
Solicitors for Defendants, Troy, N. Y.

Indorsed: Appearance for defendants. Filed April 2nd, 1881. William H. Bright, clerk.

20 *Answer.*

United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP, Complainant,
against
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS, and WALTER P. WARREN, Defendants. } In Equity.

The joint and several answers of said defendants, Joseph W. Fuller, John Hobart Warren, George A. Wells, and Walter P. Warren, to the bill of complaint herein of said William J. Keep.

These defendants, now and at all times hereafter, saving and reserving to themselves and each of them all benefit and advantage

of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill of complaint contained, for answer thereto or unto such parts thereof as these defendants are advised it is material or necessary for them or either of them to make answer unto, answering, say—

These defendants are informed & believe and therefore admit that the various letters patent in said bill of complaint referred to were granted to said Keep; but these defendants upon information and belief deny that said Keep was the first or original inventor of any improvement described in said letters patent or reissued letters patent or either thereof, or that any such alleged improvement was not known or used before & not in public use or on sale for two years prior to the application of complainant herein for letters patent therefor, or that any such alleged improvement was new or useful.

21

And these defendants, further answering, admit that the reissue of the patent No. 101,368 in said bill of complaint referred to was granted & the preceding letters surrendered as in said bill is alleged; but these defendants upon information & belief deny that the letters patent were so surrendered for any good or lawful cause, & deny that any error therein arose from inadvertence, accident, or mistake or without fraudulent or deceptive intention, or that said reissued letters patent are for the same invention as that described in the said original letters patent, or that the entire title to said reissued letters patent is now vested in complainant, and these defendants in that behalf upon information & belief aver that such reissue was obtained illegally, wrongfully, & by false pretenses & for the sole purpose of expanding the scope & character of said patent and claims, and so as to include & cover matter & things not named in or made a part of the invention & improvements claimed or described in said original patent, & such reissue was & is therefore void, and said defendants pray that the same may be declared & adjudged so to be by this honorable court.

22

And these defendants, further answering, deny that said complainant has extensively applied the said several alleged inventions in the complaint referred to to practical use, or that the exclusive right to the same has been recognized, respected, and acquiesced in by the trade & the public generally, or that but for the alleged infringements in said complaint complained of said complainant would be in the undisturbed possession, use, or enjoyment of the exclusive privileges secured by said seven letters patent or reissued letters patent & in receipt of the profits of the same.

These defendants further deny that after the date & granting of the several patents in said bill of complaint or at any other time after 1869 they have contrived to injure said complainant as charged in said bill of complaint, or that they have deprived the said complainant of the benefits & advantages which might accrue unto him from the said alleged inventions, or that they have used & vended or are now making, using, or vending the said alleged inventions or any thereof against the will of said complainant or in violation of his rights or in infringement of the said seven letters patent &

reissued letters patent in the complaint mentioned or either thereof (except that they have since February 1, 1878, made a small number of Stewart cooking stoves containing some of the alleged improvements or inventions described in said letters patent as improvements upon the said Stewart stove); but, on the contrary, these defendants aver the fact to be that since the issue of the patents named in said bill of complaint & after the year 1868 (with the exception of a small number of cooking stoves made as aforesaid since February 1, 1878) all the cooking stoves made & sold by these defendants & containing the alleged inventions & improvements claimed in patents Nos. 90850, 90756, 121,876, 139,583, and design patent No. 8685 were one class of cooking stoves known as the Stewart stoves, & such alleged improvements & inventions were made & applied to said Stewart cooking stoves alone by these defendants under the direction of & by the consent & approval of the said complainant, & for which use of said alleged inventions by these defendants the complainant has been equitably & fully paid.

23

And these defendants, further answering to the charges wrongfully made in said bill of complaint that these defendants, since the granting of the patents named in said bill & since 1869, have contrived to injure the complainant & deprive him of any acquired rights, aver to the contrary & charge the fact to be that these defendants, at the request of said complainant & by way of trial, to their great pecuniary loss & damage, spent large sums of money in endeavoring to introduce & so as to sell to the public base burning stoves containing the alleged improvements claimed & described in patents No. 129,348 & reissue 4386, named in said bill of complaint, & they did make & sell a small number of stoves containing the said alleged improvements, & said stoves when made & sold proved valueless & inferior & were failures & inoperative on account of & because they contained such alleged improvements, & these defendants, to their loss & damage, on this account, were compelled to take them back from purchasers to whom these defendants had sold them; and these defendants, further answering, aver the fact to be that all the base-burning stoves made & sold by these defendants & containing the alleged improvements claimed in said patents No. 129,348 & reissue 4386, granted to the complainant & named in the bill of complaint, were made by these defendants prior to January 23, 1875, under the supervision & direction of the complainant & by and with his consent & allowance & for which use of said alleged inventions & improvements the complainant has been fully & equitably paid.

24

And these defendants, further answering, aver the fact to be that prior to 1869 they were engaged in manufacturing cooking stoves under a license from Philo P. Stewart to make the cooking stoves patented by him on January 18, 1859, and that the patents granted to the complainant & designated in said bill of complaint as patents Nos. 90756, 90850, & 121,876 were conditioned in their specifications and issue as improvements upon said Stewart patent of January 18, 1859; and these defendants further charge the fact to be

that the alleged improvement in stove grates described & claimed in patent No. 139,583, named in the bill of complaint, and the design patent No. 8685 & the alleged inventions described & claimed in patents Nos. 90756, 90850, & 121,876, were by these defendants applied to the Stewart stove, patented January 18, 1859, under the direction and supervision of the complainant, with the exception of a few stoves made after February 25, 1876, and these de-
25 fendants aver the fact to be that while before the addition to the Stewart stove, patented January 18, 1859, of the alleged improvements named in the several patents numbered 90756, 90850, 121,876, 139,583, & the design patent No. 8685, the sale of said Stewart stove was large, after the addition of the said alleged improvements the demand for the Stewart stoves began rapidly to decline & continued to decline until the first of February, 1876, when the demand had almost ceased; and upon information & belief these defendants aver this to have been largely caused & produced by the addition to said stoves of the said so-called & alleged improvements.

Said defendants, further answering, aver that the stoves made & sold by them containing the alleged inventions & improvements described & claimed in said patent No. 129,348 were failures & were unpopular with the public, & on account of the impracticable nature & construction of the so-called improvements & inventions, as embodied in said patent No. 129,348, & their want of utility, & on which account these defendants ceased making such stoves & have made none since the 23rd day of January, 1875, excepting so far as relates to the subject-matter of claim 57 of said patent 129,348, & this claim & the specification of said patent relating thereto, upon the advice of counsel, the defendants' answer to be invalid & to recover unpatentable matter.

Said defendants, further answering, admit that they have made & sold stoves containing some of the alleged inventions &
26 improvements in the complaint referred to, but aver that, except as herein otherwise specifically admitted, they were authorized to use the same, under agreements with said complainant hereinafter named as to be produced & proved as this court may direct, & that said complainant has been fully paid under said agreements for the use by said defendants of said alleged inventions & improvements.

Said defendants, further answering, deny that the stoves & grates so manufactured & sold by them were in violation of the exclusive privileges granted to said complainant under said letters patent, or in infringement thereof or of the claims therein contained (except as herein otherwise specifically admitted), or that they have made & sold large quantities & numbers of each of such stoves, or that they have derived & received from such manufacture & sale or that they are still deriving & receiving from such manufacture & sale great gains & profits, & deny that such gains & profits amount to the sum of 50,000 — or any other sum, & further deny that they continue to make & sell stoves & grates patented as in said complaint alleged (except stove grates described in patent No. 139,583,

to be applied as repairs to Stewart cooking stoves in use), or that they have injured or prevented said complainant from receiving or that they are now injuring or preventing said complainant from receiving any gains or profit to which complainant is lawfully entitled.

And now these defendants, having fully answered all of said bill of complaint that they are advised it is material or necessary
27 that they should answer, set up by way of defense thereto & upon information & belief aver as follows:

First. That said reissue of said letters patent No. 101,368 was obtained, as is hereinbefore in that behalf alleged, and that such reissue therefore was & is void.

Second. That said complainant at the commencement of this action was not the sole owner of the patents in the complaint mentioned.

Third. That said improvements set up, described, & claimed in letters patent No. 90756, in said bill of complaint, & which said defendants are therein alleged to have used, or material and substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in the following several letters patent of the United States, granted at their respective dates, for improvements in stoves to the following persons, viz:

To W. E. Bleeker, Henry Bleeker, & Samuel D. Vose, dated June 19, 1849, No. 6564.
To Henry Bleeker, dated Sept. 19, 1849, No. 6718.
" W. E. Bleeker, " May 27, 1849, " 6222.

Fourth. That said improvements set up, described, & claimed in letters patent No. 90850, in said bill of complaint, & which said defendants are therein alleged to have used, or material and substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in the following several letters patent of the United States, granted at their respective
28 dates, for improvements in stoves to the following persons, viz:

To Samuel Pierce, dated Nov. 17, 1863, No. 40635.
" " " " May 17, 1866, " 54600.
" J. C. Henderson, " May 1, 1860, " 28081.
" " " " " July 2, 1861, " 32691.
" W. B. Treadwell, " June 31, 1867.
" Shaver & Corse, " June 16, 1863.

Fifth. That said improvements set up, described, & claimed in reissued letters patent No. 4386, in said bill of complaint, & which said defendants are therein alleged to have used, or material & substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in the following several letters patent of the United States, granted at their respective dates, for improvements in stoves to the following persons, viz:

To F. W. Husted, dated April 21, 1868.
" James Spear, " March 1, 1870, No. 100,335.
" Zebulon Hunt, " June 13, 1864.
To Zebulon Hunt, dated Sept. 19, 1865.
" " " " Jan. 19, 1869.

Sixth. That said improvements set up, described, & claimed in letters patent No. 121,876, in said bill of complaint, & which said defendants are therein alleged to have used, or material & substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in the following several letters patent of the United States, granted at their respective dates, for improvements in stoves to the following persons, viz:

29

To William Wheeler, dated April 18, 1849.
" George W. Gardner, " Nov. 18, 1851.
" Peter A. Palmer, " " 5, 1867.
" Dennis G. Littlefield, " Oct. 10, 1871.
" R. M. Hermance, " April 26, 1870, No. 102,462.

Seventh. That said improvements set up, described, & claimed in letters patent No. 129,348, in said bill of complaint, & which said defendants are therein alleged to have used, or material & substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in various letters patent in the United States & foreign countries as follows, viz:

In the following several letters patent of the United States granted at their respective dates for improvements in stoves to the following persons, viz:

To D. P. Kayner, dated June 22, 1869, No. 91542.
" Elihu Smith, " April 13, 1869, " 88986.
" C. L. Parshley & B. Furleish, dated Jan. 9, 1838.
" George C. Boyce, dated Dec. 27, 1839.
" James Cole, " Oct. 30, 1849.
" F. C. Adams & J. Peckover, dated Dec. 7, 1858.
" David Stuart, dated Sept. 13, 1859.
" Samuel Pierce, " May 1, 1860.
" William B. Treadwell, " Dec. 31, 1867.

30

" J. J. Savage, " Feb. 12, 1867.
" J. W. Coleman, " Feb. 14, 1860, No. 27111.
" H. Pease, " Nov. 3, 1868.
" F. M. Baker, " Oct. 31, 1865, No. 50768.
" J. C. Henderson, " June 22, 1869, " 93510.
" William Clark, " Dec. 26, 1871, " 122,156.
" Edwin B. Smith, " May 21, 1872.
" Joseph Simpson, " Sept. 30, 1864, " 44348.
" John S. Perry & Andrew Dickey, dated March 1, 1870, No. 100,322.
" Nathaniel Boynton, dated Jan. 18, 1870, No. 98915.
" Henry C. March, " Dec. 20, 1870, " 110,258.
" Henry G. Giles, " March 22, 1870, " 101,001.
" James Spear, " Jan. 16, 1872, " 122,863.
" William M. Bach & Thos. B. Richards, dated June 22, 1869, No. 91517.
" Robert Diven, dated May 9, 1871, No. 114533.
" Clark B. Gregory, " Nov. 28, 1871, " 121,361.

To H. B. Van Benthusen, dated Jan. 17, 1871, No. 111,020.
" " " " " Aug. 8, 1871, antedated Aug. 3, 1868, No. 79598.
" Ambrose Spitzmiller, " July 7, 1868, No. 79607.
" S. W. Gibbs, " July 7, 1868, " 79605.
" Frank H. Husted, " April 21, 1868, " 76922.
" J. C. Henderson, " Oct. 12, 1869, " 95685.
" S. H. Ransom, " June 22, 1869, " 91563.
To S. H. Ransom, dated Dec. 28, 1869, No. 98416.

31 Also in the following several letters patent, granted in France at their respective dates for improvements in stoves, to the following persons, viz:

To M. Walker, dated Sept. 12, 1849.
" Guislan, " Dec. 7, 1843.
" Jerome J. Potel, " April 2, 1863.
" Le Fevre Fiviet, " Dec. 31, 1835.

Also in the following letters patent, granted in England:

To William Kinney, dated July 29, 1837.

Eighth. That said improvements set up, described, & claimed in letters patent No. 139,583 in said bill of complaint, & which said defendants are therein alleged to have used, or material & substantial parts thereof, before their alleged invention & discovery by said Keep had been fully shown & described in the following several letters patent of the United States, granted at their respective dates, for improvements in stoves to the following persons, viz:

To D. E. Paris, dated Dec. 31, 1867.
" Winterbottom, " June 14, 1870.
" L. W. Harwood, " Sept. 8, 1867.

Ninth. That said improvements set forth in said patent No. 90756 & which said defendants are in said complaint alleged to have used, or material & substantial parts thereof, had been in public use and on sale in this country before any invention thereof by said Keep & also more than two years before the application

32 in said complaint alleged for letters patent therefor; and that such public use & sale was made by Vose & Co. in the city of Albany, N. Y., prior to the year 1851, & was known to George W. Gardiner, then a resident of Albany, N. Y., & now a resident of Troy, N. Y.

Tenth. That said improvements set forth in said patent No. 121,876, & which said defendants are in said complaint alleged to have used, or material & substantial parts thereof, had been in public use & on sale in this country before any invention thereof by said Keep & also more than two years before the application in said complaint alleged for letters patent therefor, & that such public use & sale was made by or known to the following persons, viz:

Gurdon G. Wolfe, of Troy, N. Y.

E. J. Hicks, formerly of Troy, N. Y., now of Lansingburgh, N. Y.

John S. Perry & Dennis G. Littlefield, of Albany, N. Y., & Charles A. McLeod & Esek Bussey, of Troy, N. Y.

Eleventh. That said improvements set forth in said patent No. 129,348, & which said defendants are in said complaint alleged to

have used, or material & substantial parts thereof, had been in public use & on sale in this country before any invention thereof by said Keep & also more than two years before the application in said complaint alleged for letters patent therefor, & that such public use & sale was made by or known to the following persons, viz:

33 John V. B. Carter, James Dwyer, George W. Herrick, & Charles M. Smith, all residents of Detroit, Michigan.

Twelfth. That said improvements set forth in said patent No. 129,348, & which said defendants are in said complaint alleged to have used, or material & substantial parts thereof, had been in public use & on sale in this country before any invention thereof by said Keep, & that such public use & sale was made by or known to Jasen Van Buren, then a resident of Troy, N. Y., & now a resident of Albany, N. Y.

12¼. That said improvements set forth in said patent No. 129,348, & which said defendants are in said complaint alleged to have used, or material & substantial parts thereof, had been in public use & on sale in this country before any invention thereof by said Keep, & were applied to a stove called "The Illuminator," which was made and sold by the Treadwell Stove Company of Albany, N. Y., prior to 1870, & such public use & sale was made by or known to E. J. Hicks, of Laningsburgh, N. Y., & John S. Perry & —— Treadwell, of Albany, N. Y., & to various other persons, whose names are at present unknown to defendants, but will be furnished as soon as ascertained, & the making of which stove & the patterns for the same was known to H. C. Bascom, Robert Galbraith, Adam Clint & A. T. Smith, of Troy, N. Y., & that said alleged improvements were also applied to & put in use in a stove called "The Oriental," made and sold by Perry & Co., of Albany, N. Y., prior to the granting of said patent No. 129,348, & such public use &

34 sale was made by or known to John S. Perry, Nathan B. Perry, & Andrew Dickey, of Albany, N. Y.

Thirteenth. That said Keep was not, in fact, the original or first inventor of the improvements described & claimed in said letters patent No. 139,583, or of either thereof, but that before any invention or discovery thereof by said Keep the said improvements, or material & substantial parts thereof, had been invented or discovered by David Hathaway, a resident of Green Island, N. Y.

Fourteenth. That said Keep first learned of said improvements described in patent No. 139,583 from said Hathaway, who first conceived, designed, made, & invented the same before said Keep's application for such letters patent, & that said Keep applied for said letters patent, knowing that he was not the first or original inventor of said improvements, & knowing that said Hathaway first invented the same, & that said patent was therefore obtained illegally, wrongfully, & by false pretenses, & was & is, therefore, void, & said defendants pray that the same be declared & adjudged so to be by this honorable court.

Fifteenth. That on or about September 2, 1869, said Keep duly executed & delivered to said defendants an agreement whereby he

granted to said defendants the exclusive use of the inventions & improvements patented & secured to him by said letters patent No. 90850, or which might thereafter be secured to him by any
35 reissue thereof or upon any additional improvements upon the said invention until February 1, 1878. Said agreement was duly recorded in the United States Patent Office on the 28th day of March, 1870, in Liber O 12, page 361, which said agreement & license or a certified copy thereof these defendants are prepared to produce & prove as the court may direct.

Sixteenth. That on or about March 31, 1869, said complainant, Eliza C. Stewart, & said defendant duly entered into an agreement whereby said Keep agreed to improve the stoves therein referred to & known as the Stewart stoves, & to perfect & bring out the Stewart ranges and Stewart heaters, & that said defendants could use until February 1, 1878, in the manufacture & sale of said stoves, ranges, & heaters, all inventions & improvements which had been or during said period might be made or patented by said Keep, & also gave to said defendants the exclusive use until February 1, 1878, of a certain improvement in cooking stoves made by said Keep, for which a patent was applied for by said Keep on or about March 10, 1869, & also of a certain other improvement in the magazine for base-burning or self-feeding stoves therein referred to; that the use by said defendants of said improvements was under the provisions of said agreement & complainant has been fully paid therefor under the provisions thereof, & said agreement or a certified copy thereof these defendants are prepared to produce & prove as this court may direct.

36 Seventeenth. That on or about August 1, 1872, said complainant duly entered into an agreement with said defendants whereby, among other things, said complainant authorized said defendants, for the period & on the terms therein stated, to make certain stoves known as "side burners" & "side-burning fireplace heaters" & "base burners," & to use any improvement made by said Keep on said "side burners" or "side-burning fireplace heaters" or any invention of said Keep that might be adapted by said Keep to said stoves, as by said agreement will more fully appear; that complainant has been fully paid for the use of said improvements under said agreement by said defendants, & said agreement or a certified copy thereof these defendants are prepared to produce & prove as this court may direct.

Eighteenth. That on or about June 14, 1879, said complainant commenced an action at law, in the supreme court of the State of New York, against these defendants, whereby he seeks to recover judgment against these defendants for the alleged use by these defendants of the improvements mentioned in said agreement last above referred to & also in some of the patents named in the complaint herein, & that said action is yet pending & undetermined; that the complainant has an ample remedy at law for such cause of action, & therefore should not receive the aid of this court of equity so far as the complaint herein covers the causes of action for
37 which said complainant seeks to recover in said action in the

supreme court of the State of New York, & said defendants pray this honorable court that as to such causes the bill of complaint herein be dismissed, and if the complainant be allowed to recover herein for such cause of action or to litigate the same herein the defendants herein pray this honorable court that a writ of injunction may issue forever enjoining & restraining said complainant from further prosecuting said cause in the supreme court of the State of New York.

Nineteenth. That the state of the art of manufacturing stoves was such at the time of each of the alleged inventions by said Keep set forth in said bill of complaint that there was no actual invention in such alleged inventions, and that such alleged inventions involved only ordinary mechanical skill, & the application thereby of well-known principles and practices of such art to mere changes of form & location & merely to double uses, & that the said state of the art was well known to Gurdon G. Wolfe, Charles A. McLeod, & Esek Bussey, each of Troy, N. Y.; John S. Perry & Dennis G. Littlefield, of Albany, N. Y., & E. J. Hicks, formerly a resident of Troy, N. Y., & now of Lansingburgh, N. Y.

Twentieth. That said complainant is indebted to said defendants for money loaned & advanced by said defendants to said complainant at his request in the sum of $2,585.42, besides interest thereon from August 1, 1872; that no part of same has been paid, but the whole thereof is still due & owing from said complainant to
38 said defendants & said amount & interest thereon to the amount of any claim said complainant may establish herein said defendants claim as a set-off & counter-claim thereto.

And these defendants, having fully answered the said bill of complaint, deny the right of said complainant to the relief or any part thereof prayed for in said bill of complaint, and they therefore pray to be hence dismissed with their reasonable costs & charges in this behalf most wrongfully sustained, & they as in duty bound will ever pray.

JOS. W. FULLER.
JOHN HOBART WARREN.
GEO. A. WELLS.
WALTER P. WARREN.

GALE & ALDEN,
Solicitors & of Counsel for Defendants,
Room 4, Music Hall, Troy, N. Y.

UNITED STATES OF AMERICA.

NORTHERN DISTRICT OF NEW YORK, } ss.:
Rensselaer County, }

Walter P. Warren, being sworn, says that he is a defendant named in foregoing answer, and has read said answer & knows the contents thereof; that said answer is true of his own knowledge except as to the matters which are therein stated to be alleged on information and belief, & that as to those matters he believes it to be true.

WALTER P. WARREN.

Subscribed & sworn to before me this 22 day of Oct., 1881.
JOHN F. CALDER,
[L. S.] *Notary Public, Troy, N. Y.*

39 Indorsed: Answer. Service of a copy of within answer is hereby admitted. Oct. 25, '81. N. Davenport, solicitor & of counsel for pl'ff. Filed Dec. 8th, 1881. William H. Bright, clerk.

40 *Replication.*

United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP
vs.
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS, & WALTER P. WARREN.

Replication of William J. Keep to the answer of the defendants.

This repliant, reserving & saving unto himself now & at all times hereafter all & all manner of benefit & advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain, & prove his said bill of complaint to be true, certain, & sufficient in law to be answered unto, & that the said answer of the said defendants is uncertain, untrue, & insufficient to be replied unto by these repliants; without this, & any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein & hereby well & sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters & things this repliant is & will be ready to aver, maintain, & prove as this honorable court shall direct, and humbly pray as in & by the said bill he has already prayed.

N. DAVENPORT,
Complainant's Solicitor.

Indorsed: Replication. Filed Dec. 8, 1881. William H. Bright, clerk.

41 *Decree.*

United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP
vs.
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS, & WALTER P. WARREN, Def'ts.

This cause having come on to be heard upon the bill of complaint. answer & replication, & the proofs taken & filed in said case, now, on motion of N. Davenport, of counsel for complainant—John B. Gale, Esq., appearing as counsel for defendants and consenting to this decree—

It is ordered, adjudged, & decreed as follows:

That the letters patent No. 90576, dated June 1st, 1869, and No. 90850, dated June 1, 1869, and reissue No. 4386, dated May 16, 1871, and No. 139,583, dated June 3, 1873, and No. 8683 (design), dated October 5, 1875, and No. 121,876, dated December 12, 1871, and No. 129,348, dated July 16, 1872, granted & issued to said complainant & being the several letters patent set up in said bill of complaint herein, are good & valid patents, & that said complainant was & is the first & original inventor of the improvements in stoves & also in grates described & claimed in each & every of the said letters patent and the specifications annexed thereto & is the exclusive owner of each & every of said letters patent.

42 That the said defendants, Joseph W. Fuller, John Hobart Warren, George A. Wells, & Walter P. Warren, have & each & every one of them has infringed upon each & every one of said several letters patent (except No. 129,348) & upon the exclusive rights of said complainant thereunder as set forth in said bill of complaint by making & selling in the city of Troy, in said northern district of New York, articles containing all or some parts of the devices described & claimed in said letters patent (except No. 129,348) set up in said complaint.

That as to the said letters patent No. 129,348, dated July 16, 1872, it appearing that said defendants were licensed by said plaintiff to manufacture & vend stoves under said patent No. 129,348 anywhere in the United States, & that said license has not expired, no claim therefore for profits or damages on account of any alleged infringement of this patent can be sustained.

That the said complainant recover of said defendants & said defendants account for & pay to said complain-t the gains & profits which said defendants have received or made by reason of the manufacture or sale of stoves or grates or parts thereof containing said improvements & inventions or any of them (except those in letters patent No. 129,348), & also for all damages sustained by said complainant by reason of said manufacture or sale as aforesaid, with the costs & disbursements of this action, & that it be referred to John M. Landon, Esq., one of the masters of this court residing in the city of Troy, to ascertain, take, & report to this court an account of the infringements by said defendants of said letters patent

43 (except of said letters patent No. 129,348); also the gains & profits derived by said defendants for such infringements, & also for all damages sustained by said complainant by reason thereof, & that said defendants appear before said master with their books & vouchers from time to time as said master may direct.

That such gains, profits, damages, & accounting shall not apply to any stoves made or sold by said defendants before February 1st, 1878, nor to any grates made or sold by said defendants before that date, except to grates covered by said letters patent No. 139,583 & supplied by defendants after January 1, 1876, to stoves originally sold by them without such grates.

WM. J. WALLACE.

I, John B. Gale, counsel for the defendants in this action, hereby consent that the within decree be made and entered in this action.

JNO. B. GALE,
Counsel for Def'ts.

Indorsed: Decree. Filed Mar. 20, 1883. William H. Bright, clerk.

44 *Stipulation.*

U. S. Circuit Court, Northern District of New York. In Equity.

WILLIAM J. KEEP
ag'st
JOHN HOBART WARREN, GEORGE E. WELLS, & WALTER P. WARREN, Survivors of Joseph W. FulHer.

We hereby consent that Esek Cowen may be substituted in our place and stead as solicitors for the defendants in the above-entitled suit, and that an order of course may be entered making such substitution.

GALE & ALDEN.

Indorsed: Substitution. Filed Jun- 29, 1889. W. S. Doolittle, clerk.

45 *Order for Substitution.*

At a special term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at Utica on the 29th day of June, A. D. 1889.

Present: The Honorable Alfred C. Coxe, judge.

WILLIAM J. KEEP
vs.
JOHN HOBART WARREN *et al.* } No. 3140.

On reading and filing consent in above-entitled action, and on motion of Esek Cowen —

Ordered that his appearance be, and the same is hereby, entered in the place and stead of Mess. Gale and Alden, attorneys for defendants herein.

ALFRED C. COXE.

Indorsed: Order of substitution. Filed Jun- 29, 1889. W. S. Doolittle, clerk.

46 *Master's Report.*

United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP, Complainant,
against
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS and WALTER P. WARREN, Defendants. } In Equity.

To the circuit court of the United States for the northern district of New York:

In pursuance of a decretal order made and entered in this cause, and bearing date March 20, 1883, at a stated term of this court, held in the city of Utica in the said northern district of New York, by which it was referred to John M. Landon of the city of Troy, as a master of this court, to ascertain, take, and report to this court the account of the infringements of said defendants of letters patent No. 90756 and No. 90850, dated June 1, 1869, and of No. 121,876, dated December 12, 1871, and of reissue No. 4386, dated May 16, 1871, for improvements in stoves, and of No. 8685, dated October 5, 1875, for a design for stoves, and of No. 139,583, dated June 3, 1873, for improvements in stove grates.

47 Also the gains and profits derived by said defendants from said infringements, and also for all damages sustained by said complainant by reason thereof, but that such gains, profits, damages and accounting should not apply to any stoves made or sold by said defendants before February 1, 1878, nor to any grates made or sold by said defendants before that date, except to grates covered by said patent No. 139,583, supplied by defendants after January 1, 1876, to stoves originally sold by them without such grates.

I, John M. Landon, master, do respectfully report that I have proceeded to investigate the said matters, so referred to me, and have been attended by the parties to said action with their respective counsel, and after taking proofs and duly deliberating thereon, I find and report as follows:

First. Letters patent No. 90576 relate to flue plates for stoves, patent No. 90850 to hearths, doors and dampers for stoves, and reissue No. 4386 to ash pans for stoves, and may be considered together.

These several improved devices were put into and sold with and as parts of 855 stoves by the defendants. The complainant claims that these improved parts added to the selling value of the stove $2.20 each, amounting to $1,880. From the proofs it may be inferred that the stoves with these improved parts found a more ready and profitable market. There were some serious defects in the old stove, which were remedied by these alleged improvements, and which revived the demand and improved the reputation of the stove. Increased sales resulted from said improvements, and a larger number were sold than would otherwise have been sold if

such improved devices had not been put into the stove. But how many more were sold does not appear, nor does it appear that the stoves were sold for any larger sum with these improve-
48 ments in them; on the contrary, the evidence shows that they were put upon the market at the same old price. How much profit was realized by the defendants from the sales of such stoves, and what portion of any profits realized from sales was due to these improvements, does not appear, and I therefore disallow all claims for profits and damages alleged to have been caused by the manufacture and sale of the said several infringing devices.

Second. Letters patent No. 8685 is a design for a stove.

I find that between February 1, 1878, and January 1, 1882, said defendant made and sold 855 stoves which infringed this patent.

The complainant claims that this design increased the market or selling value of the stove 25 cents each. The evidence shows that occasional changes in the pattern or design of stoves are necessary in order to hold the trade and to keep up with the demands and competitions in the business, and it may be inferred that this new design increased the sales of the defendants' stoves, but how much profits were realized from the sales of the 855 stoves, or how much of any profits realized were due to this external ornamentation of the stoves, does not appear, and I therefore disallow this claim.

Third. Letters patent No. 121,876 relate to water-backs for stoves.

I find that between the dates above named the defendants made and sold 144 water-backs which infringed this patent. They were called "extras," and were not sold in or with the stove or as a part of it, but as a separate, independent marketable article, to be attached to a stove by the purchaser when water connections could be made. Sixty of the said infringing water-backs were sold by the defendants at a net profit of $1.33 each, and 84 of them
49 at a net profit of $1.73 each, making a total of $225.12.

Fourth. Letters patent No. 139,583 is for a stove grate.

This grate is a complete combination in itself. The parts and combinations described and claimed in the several claims in the patent constitute the entire device. In the testimony the grate is generally called the "Keep grate," but is designated on the defendants' books as "D. G. S.," or "D. G. Stewart S.," &c.

I have excluded from the account all grates which were sold in or with a stove, and have only considered such as were sold as separate and independent articles. The account is taken by periods because the cost of the grates and the prices at which they were sold varied with such periods.

I find that between January 1, 1876, and July 10, 1877, the said defendants made and sold 2,687 grates which infringed said letters patent No. 139,583, and that 2,426 thereof were sold for stoves which had theretofore been sold without this kind of a grate in them. Of these grates 199 were No. 3½, which cost the defendants 40 cents each, and were sold by them for $1.25 each. 931 were No. 4½, which cost the defendants 48 cents each, and were sold by them for $1.50 each.

One thousand two hundred and ninety-six were No. 5½, which

cost the defendants 52 cents each, and were sold by them for $1.75 each, making a total profit received by said defendants from the sale of said 2,426 grates of $2,712.85.

I also find that between July 10, 1877, and May 15, 1878, the said defendants made and sold 1,551 of said infringing grates, and that 1,318 thereof were sold for stoves which had been theretofore
50 sold without this kind of a grate in them. Of these grates 199 were No. 3½, which cost the defendants 37 cents each, and were sold by them for $1.06 each.

Five hundred and thirty were No. 4½, which cost the defendants 45 cents each, and were sold by them for $1.25 each.

Five hundred and eighty-nine were No. 5½, and cost the defendants 47 cents each, and were sold by them for $1.50 each, making a total profit received by said defendants from the sale of said 1,318 grates of $1,167.98.

The remaining 494 grates I have disallowed for the reason that it does not appear that they were sold after February 1, 1878, and if sold before that date the numbers by which they were known do not indicate that they were sold for stoves which had been theretofore sold with a different kind of grate in them.

I also find that between May 15, 1878, and February 9, 1880, the said defendant made and sold 3,384 of said infringing grates. Of these grates 192 were No. 3½ which cost the defendants 40 cents each and were sold by them for $1.20 each.

One thousand and ten were No. 4½ which cost the defendants 48 cents each, and were sold by them for $1.35 each.

One thousand one hundred and forty-six were No. 5½ which cost the defendants 52 cents each and were sold by them for $1.50 each.

Eighty-one were No. 7½, C. F., which cost the defendants 40 cents each and were sold by them for $1.20 each.

Fifty-three were No. 7½, N. C., which cost the defendants 49 cents each and were sold by them for $1 20 each.

51 Two hundred and twenty-six were No. 8½ C. F., which cost the defendants 48 cents each and were sold by them for $1.35 each.

Two hundred and thirty-six were No. 8½ N. C., which cost the defendants 60 cents each and were sold by them for $1.35 each.

Two hundred and eight were No. 9 C. F., which cost the defendants 52 cents each and were sold by them for $1.50 each.

Two hundred and thirty-two were No. 9 N. C., which cost the defendants 63 cents each and were sold by them for $1.50 each; making a total profit received by said defendants from the sale of the said 3,384 grates of $3,037.11.

I also find that between February 9, 1880, and March 2?, 1880, the said defendants made and sold 227 of said infringing grates and of these grates 12 were No. 3½, which cost the defendants 45 cents each and were sold by them for $1.60 each.

Thirty-three were No. 4½ and cost the defendants 55 cents each and were sold by them for $1.80 each.

One hundred and fifteen were No. 5½, which cost the defendants 59 cents each and were sold by them for $2.00 each.

Twenty-four were No. 8½ C. F., which cost the defendants 55 cents each and were sold by them for $1.80 each.

Nine were No. 9 C. F., which cost the defendants 59 cents each and were sold by them for $2.00 each.

Eight were No. 7½ N. C., which cost the defendants 56 cents each and were sold by them for $1.70 each.

Eleven were No. 8½ N. C., which cost the defendants 68 cents each and were sold by them for $2.00 each.

52 Fifteen were No. 9 N. C., which cost the defendants 72 cents each and were sold by them for $2.25 each, making a total profit received by said defendants from the sale of said 227 grates of $306.48.

I also find that between March 22, 1880, and January 1, 1882, the said defendants made and sold 2,920 of said infringing grates, and that 231 were No. 3½, which cost the defendants 40 cents each and were sold by them for $1.45 each.

Nine hundred and forty-seven were No. 4½, which cost the said defendants 48 cents each and were sold by them for $1.60 each.

Nine hundred and thirteen were No. 5½, which cost the said defendants 52 cents each and were sold by them for $1.75 each.

Ninety-five were No. 7½ C. F., which cost the said defendants 40 cents each and were sold by them for $1.45 each.

Two hundred and ten were No. 8½ C. F., which cost the said defendants 48 cents each and were sold by them for $1.60 each.

Two hundred and thirty-nine were No. 9 C. F., which cost the said defendants 52 cents each and were sold by them for $1.75 each.

Fifteen were No. 7½ N. C., which cost the said defendants 49 cents each and were sold by them for $1.45 each.

Ninety-five were No. 8½ N. C., which cost the said defendants 60 cents each and were sold by them for $1.60 each.

One hundred and seventy-five were No. 9 N. C., which cost the said defendants 63 cents each and were sold by them for $1.75 each, making a total profit realized by said defendants from the sale of said 2,920 grates of $3,360.50.

53 From this sum I deduct the profit realized from the sale of 156 grates, which it is conceded were erroneously included in the account for some of the foregoing periods, and I compute the profit at the highest rate received during foregoing period, viz: $1.23, because the evidence fails to show how much the profits were on these 156 grates, $191.88, leaving a balance of profits of $3,168.62.

I also find that between February 1, 1878, and January 1, 1882, the said defendants made and sold 485 more of said infringing grates under the name "Director," and conceded to have been the said Keep grates. This grate was made a little heavier and with some changes in detail of construction, but involving the same general principles. Of this number 261 were No. 7½, from the sale of which said defendants realized a profit of 80 cents each. 194 were No. 8½, from the sale of which said defendants realized a profit of 75 cents each.

Thirty were No. 9, from the sale of which said defendants realized a profit of 87 cents each, which profits were all due to said invention, and amounting to $380.40.

I also find that between January 1 and July 1, 1879, the said defendants made and sold, in addition to the foregoing, 400 of said infringing grates. The sales books for this period were not produced by the defendants, for the alleged reason that they had been burned at the fire which consumed their store. But by comparison of sales during the corresponding months for the year before and for the year after, the number is found to be 400. The specific number of the various sizes of the grates composing the 400 might, perhaps, be ascertained with reasonable accuracy by comparison, but I have computed the profits at the average profits realized by defendants from the sale of such grates during the year 1879, viz: 87 cents each and find that they received from the sale of said grates profits amounting to $348.00.

54 I also find in addition to the foregoing that the defendants sold at their retail store in Troy between February 1, 1878, and January 1, 1882, 587 infringing grates. The defendants during said time carried on a large retail store in Troy and kept on sale and sold said infringing grates, but as the defendants failed to produce their books containing an account of sales, the exact number sold cannot be ascertained. The defendants gave no information as to the number sold, nor did they claim that the estimate made by complainant of such sales was too large, and I, therefore, conclude and find that the lowest number estimated by the complainant to have been sold at defendants' store during said period, viz: 587 is correct, and I find that the profit received by them was 98 cents each, being the average profit realized by the defendants from the sales of such grates between said dates, amounting to $575.26.

I also find, in addition to the above, that the defendants made and sent to their branch houses in New York, Chicago and Cleveland, for sale, between February 1, 1878, and January 1, 1882, a large number of said infringing grates, but they failed to produce any books showing the number shipped to said branch houses or any information in relation thereto. The lowest estimate of sales by the defendants, or lowest number shipped to said branch houses by defendants' book-keeper is 50 per year for each branch house, amounting to 513 grates. The fair inference is that they were sold at a profit, and at the same profit realized from the sales of same grates in Troy during the same time, and I find that the defendants received from the sale of said 513 grates between February 1, 1878, and January 1, 1882, the average profits, viz: 98 cents each, amounting to $504.74.

I further find that between said February 1, 1878, and
55 January 1, 1882, the defendants sold 855 stoves into which said infringing grates may have been put and I assume that all of said stoves had such grates in them, and as there is no evidence showing what part of any profits received from the sale of such stoves was due to this grate, I deduct from the foregoing computed profits the average profits received from the sale of such grates

during said period, viz: 98 cents each, amounting to $837.90, making the total amount of said profits realized, as aforesaid, by said defendants from the sale of said infringing grates between the dates fixed by the decree herein $11,363.54, and that the damages sustained by said complainant by reason of said infringements, in addition to said profits, is six cents, and I therefore respectfully report that said defendants should be decreed to pay said complainant the sum of $11,363.60, besides the costs to be taxed.

The proofs and exhibits are herewith presented.

All of which is respectfully submitted.

Troy, May 9, 1889.

J. M. LANDON, *Master.*

Indorsed: Accounting. Master's report. Filed June 17, 1889. W. S. Doolittle, clerk.

56 *Exceptions to Master's Report.*

United States Circuit Court, Northern District of New York. In Equity.

WILLIAM J. KEEP, Complainant,
against
JOHN HOBART WARREN, GEORGE A. WELLS, and WALTER P. WARREN, Survivors of Joseph W. Fuller, Deceased, Defendants.

The defendants in the above-entitled suit hereby except to the report of John M. Landon, Esq., master in chancery, made in this suit and filed in the office of the clerk of this court on the 17th day of June, 1889, as follows:

First. For that the said master reported that between the 1st day of January, 1876, and the 10th day of July, 1877, the defendants sold 2,426 separate grates which were infringements of the complainant's patent No. 139,583, whereas the said master should have reported that there was no evidence before him from which he could ascertain how many of said infringing grates had been sold by the defendants during the period mentioned.

Second. For that the said master has reported the aggregate profits received by the said defendants from the sales of said grates instead of such portion of said profits as is due to the em-
57 ployment of the invention patented by the complainant, whereas the said master should have reported that no evidence was produced before him by the complainant from which the master could ascertain or state the proportion of profits due to said patented improvement.

Third. For that the said master has reported that between July 10th, 1877, and May 15th, 1878, the defendants made and sold 1,318 separate grates which infringed complainant's said patent, whereas he should have reported that from the evidence before him it was impossible to ascertain how many of said infringing grates had been sold by the defendants between the dates last mentioned.

Fourth. For that the said master has reported the aggregate profits received by the defendants from the sale of said 1,318 grates instead of such portion of the said profits as *were* due to the complainant's invention, whereas the said master should have reported that the complainant failed to produce before him any evidence from which he could ascertain or state what proportion of the said profits was due to the patented improvement of complainant.

Fifth. For that the said master has reported that between May 15th, 1878, and February 9th, 1880, the said defendants made and sold 3,384 of said infringing grates, whereas the said master should have reported that from the evidence before him it was impossible to ascertain how many of said infringing grates had been sold by the defendants between the dates last above mentioned.

58 Sixth. For that the said master has reported the aggregate profits received by the defendants upon the sale of the said 3,384 grates instead of such portion of said profits as was due to the complainant's invention, whereas the said master should have reported that the complainant had produced before him no evidence from which he could ascertain or state the proportion of said profits due to the patented improvement of complainant.

Seventh. For that the said master has reported that between the 9th day of February, 1880, and the 22nd day of March, 1880, the defendants made and sold 227 of said infringing grates, whereas the said master should have reported that from the evidence before him it was impossible to ascertain the number of infringing grates sold by the defendants during the period last mentioned.

Eighth. For that the said master has reported the aggregate profits received by the defendants upon the sale of said 227 grates instead of the portion of such profits due to complainant's invention, whereas the said master should have reported that the complainant had not produced before him any evidence from which he could ascertain or state what proportion of said profits *were* due to the patented improvement of the complainant.

Ninth. For that the said master has reported that between
59 March 22nd, 1880, and January 1, 1882, the defendants made and sold (2,920 — 156) 2,764 of said infringing grates, whereas the said master should have reported that from the evidence before him it was impossible to ascertain the number of said grates that had been sold by the defendants during the period last aforesaid.

Tenth. For that the said master has reported the aggregate profits upon the sale by the defendants of the said 2,764 grates instead of the portion of such profits due to the complainant's patented invention, whereas the said master should have reported that the complainant had not produced before him any evidence from which he could ascertain or state the proportion of such profits that was due to the patented improvement of the complainant.

Eleventh. For that the said master has reported that the profits received by the defendants from the sale of 485 "Director" grates made under the said complainant's patent and due to the complainant's patented invention were $380.40, whereas the said master

should have reported that the complainant had not produced before him any evidence from which he could ascertain or state what proportion of such profits was due to the patented improvement of the complainant.

Twelfth. For that the said master has reported that in addition to the number of infringing grates hereinbefore enumerated the said defendant- between January 1st, 1879, and July 1st,
60 1879, made and sold 400 of these infringing grates, when there was no proof whatever to justify such finding; also that the said master found, without proof, that the profits received by the defendants for the said 400 grates were $348.00.

Thirteenth. For that the said master has reported the aggregate profits alleged to have been received by the defendants upon the sale of the last-mentioned 400 grates, whereas the said master should have reported that the complainant had not produced before him any evidence from which he could ascertain or state the proportion of such profits due to the patented improvement of the complainant.

Fourteenth. For that the said master has reported that between February 1, 1878, and January 1, 1882, the defendants shipped to their branch houses in New York, Chicago, and Cleveland and there sold 513 of these infringing grates, when there was no evidence to support such a finding; for that he also reports that the profits received by the defendants on the said 513 grates were $504.74, when there was no evidence on that subject.

Fifteenth. For that the said master has reported the aggregate profits alleged to have been received by the defendants on the sale of the said 513 grates instead of such portion of said profits as *were* due to the complainant's invention, whereas the said master should have reported that the complainant had produced before him no evidence from which he could ascertain or state what
61 proportion of the said profits *were* due to the patented improvement of the complainant.

Sixteenth. For that the said master has reported that the defendants should be decreed to pay the complainant the sum of $11,363.60, whereas the said master should have reported that the complainant was entitled to recover only nominal damages.

ESEK COWEN,
Solicitor for Defendants.

Indorsed: Exceptions to master's report. Filed Jun- 29, 1889. W. S. Doolittle, clerk.

62 *Final Decree.*

At a stated term of the circuit court of the United States for the northern district of New York held at Canandaigua on the 17th day of June, 1890.

Present: Hon. A. C. Coxe, judge.

WILLIAM J. KEEP, Complainant,
vs.
JOHN HOBART WARREN, JOSEPH W. FULLER, George A. Wells, & Walter P. Warren, Defendants. } In Equity. No. 3140.

This cause having come on to be heard upon the report of John M. Landon, Esq., duly appointed by this court as master, and to whom it was referred to ascertain and report to this court an account of the infringements by said defendants of the letters patent set forth in the decree in this action, also the gains and profits derived by said defendants from such infringements, and also for all damages sustained by said complainant by reason thereof, which said report bears date May 9, 1889, and also upon the exceptions taken to said report on the part of said defendants, and after hearing N. Davenport for said complainant and Esek Cowen for said defendants, and having duly deliberated thereon—

It is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree, that all the exceptions to said report except the 12th
63 and 14th be, and the same are hereby, overruled, and that under said 12th and 14th exceptions the amount found by said master be reduced from $11,363.60 to $10,510.86, and as so reduced the report of said master be, and hereby is, confirmed, viz., at $10,510.86, and that said defendants pay to said complainant the said sum of $10,510.86, with interest thereon from June 16, 1889, the date when said report was submitted to this court.

And it is further ordered, adjudged and decreed that the said defendants also pay to the complainant his costs in this suit, to be taxed, and that said complainant have judgment and execution for such costs and for the sums above decreed to be paid by said defendants to said complainant as aforesaid.

ALFRED C. COXE, *U. S. J.*

Indorsed: Decree. Filed Jul- 31, 1890. W. S. Doolittle, clerk.

64 And the costs having been taxed by the clerk at four hundred and fifty-one dollars, the process, pleadings, and decrees, together with other papers in said cause, are duly annexed hereto.

Wherefore let the said complainant, William J. Keep, recover of said defendants, Joseph W. Fuller, John Hobart Warren, George A. Wells, and Walter P. Warren, the sum of ten thousand five hundred and ten dollars and eighty-six cents, with interest thereon

from June 16th, 1889, to the date hereof, amounting to eight hundred and fifteen dollars and ninety-six cents, together with the sum of four hundred and fifty-one dollars, the costs and charges as taxed, making in the aggregate the sum of eleven thousand seven hundred and seventy-seven dollars and eighty-two cents ($11,777.82).

Signed and enrolled, pursuant to the rules and practice of this court, this second day of October, in the year of our Lord one thousand eight hundred and ninety, at twelve o'clock noon.

W. S. DOOLITTLE, *Clerk.*

Indorsement on cover: In equity. No. 3140. United States circuit court, northern district of New York. William J. Keep *vs.* John Hobart Warren, Joseph W. Fuller, George A. Wells, & Walter P. Warren. Final record. N. Davenport, compl't's sol'r.

Dam.....	$10,510 86
Int.....	815 96
Costs.....	451 00
	$11,777 82

Judgment. Filed and entered October 2, 1890, at 12 o'clock m. W. S. Doolittle, clerk.

65 *Testimony before the Master.*

United States Circuit Court, Northern District New York.

WILLIAM J. KEEP
versus
JOS. W. FULLER, JOHN HOBART WARREN, GEO. A. WELLS, and WALTER P. WARREN.

Matter of accounting of defendants before John M. Landon, master, under a decree of this court in this case filed March 20, 1883.

N. Davenport appeared for plaintiff.
John B. Gale appeared for the defendants.

DECEMBER 28, 1883.

A *subpœna duces tecum* having been duly served on defendant, Walter P. Warren, and he appearing in obedience to such subpœna, it is stipulated that the books mentioned in such subpœna as the books of the defendants may be examined by plaintiff and his attorneys at the office of the defendants.

Adjourned to meet on notice of the plaintiff's attorney to the defendants' attorney.

TROY, *Feb.* 18, 1884.

The parties by their respective attorneys appeared before me at my office, No. 10 State street.

66 WILLIAM J. KEEP, sworn for the plaintiff:

Ques. 1. What is your name, age, residence and occupation?

Ans. Name, W. J. Keep; age, 42; residence, Troy, N. Y.; my present occupation is a superintendent of the manufacturing of stoves.

Ques. 2. How long have you been engaged in *the* stove manufacturing, and if you have been engaged in the manufacturing of stoves in connection with defendants you may state how long, between what dates and in what capacity?

Ans. I have been thus engaged for nineteen years, but with the defendants from June 1, 1868, until January 1, 1876, as superintendent of the manufacturing of the Stewart stoves, under an agreement with the defendants, the Stewart estate and myself, my compensation being paid by the Stewart estate; I superintended the manufacture of these stoves at the works of defendants, who were during that time manufacturing such stoves under an agreement with the Stewart estate.

FEBRUARY 18, 1884.

Ques. 3. State whether or not you are familiar with the various patents under which the so-called Stewart stoves were manufactured.

Ans. I am.

Ques. 5. Are you familiar with the patent No. 139,583, dated June 3, '73, for an improvement in grates, issued to you, W. J. Keep?

Ans. Yes, I am; I invented the same prior to its date; it is composed of short horizontal transverse bars, which vibrate and dump upon a longitudinal central bar, and was generally known as the Keep grate, and also known as the 1873 grate; in advertising it was called the Keep grate.

The plaintiff offers in evidence letters patent No. 135,583, dated June 3, 1873, for an improvement in grates, marked "Exhibit A."

67 Ques. 6. Is this the patent mentioned in the decree in this case under the same date and number?

Ans. It is.

Certified copy of the decree in this case offered in evidence; received and marked "Exhibit B."

Ques. 7. You may state if you know whether or not the defendants manufactured and sold the so-called Keep grates, patent No. 139,583, and to what extent, if you know, and how you know?

Ans. I have examined defendants' books under the stipulation spoken of, that is, their books in the office in Troy, but not the books in their branch houses, and I find on those book at the Troy office that the defendants made and sold these so-called Keep grates (under patent 139,583) between January 1, 1876, and July 10, 1877:

199 of No. 3½ of such grates.
931 " 4½ " "
1,296 " 5½ " "

And between July 10, 1877, and May 15, 1878, as follows:
The detailed statement of the 494 grates not allowed by the master is here omitted by consent.

199 of No. 3½ of such grates.
530 " 4½ " "
589 " 5½ " "

And between May 15, 1878, and February 9, 1880:

192 of No. 3½ of such grates.
1,010 " 4½ " "
1,146 " 5½ " "
81 " 7½ C. F. " "
226 " 8½ " " "
208 " 9 " " "
53 " 7½ N. C. " "
236 " 8½ " " "
232 " 9 " " "

68 And between Feb. 9, 1880, and March 22, 1880:

12 of No. 3½ of such grates.
33 of No. 4½ of such grates.
115 " 5½ " "
24 " 8½ C. F. " "
9 " 9 " " "
8 " 7½ N. C. " "
11 " 8½ " " "
15 " 9 " " "

And between March 22, 1880, and Jan. 1, 1882:

231 of No. 3½ of such grates.
947 " 4½ " "
913 " 5½ " "
95 " 7½ C. F. " "
210 " 8½ " " "
239 " 9 " " "
15 " 7½ N. C. " "
95 " 8½ " " "
175 " 9 " " "

And also as follows after Jan. 1st, 1878:

261 of No. 7½ of such grates, called Director.
164 " 8½ " " " "
30 " 9 " " " "

Ques. 9. State if you can how many of such grates as shown by such books were sold between January 1, 1876, and February 1, 1878, for stoves originally sold without such grates, and, if you can, give the number. You may say how you are able to do so.

Ans. All the grates above given between said dates in your question and designated 3½, 4½ and 5½. I know this is so, because no stoves for the grates bearing these numbers were made after January 1st, 1876. The numbers had been changed in the year 1873, and the manufacture of the stoves under the old numbers then ceased, and the stoves that were thereafter manufactured were made as Nos. 7½, 8½ and 9.

69 Ques. 10. If you are able to give the weights of these grates by their numbers, please do so.

Ans. I am.

The $3\frac{1}{2}$ and the $7\frac{1}{2}$ C. F. weighed $11\frac{1}{4}$ lbs. each.
" $4\frac{1}{2}$ " " $8\frac{1}{2}$ " " $13\frac{3}{4}$ " "
" $5\frac{1}{2}$ " " 9 " " $14\frac{3}{4}$ " "
" $7\frac{1}{2}$ N. C. " 14 " "
" $8\frac{1}{2}$ " " 17 " "
" 9 " " 18 " "

Ques. 11. Are you familiar with the cost of those grates and stove castings generally at that time?

Ans. Yes.

Ques. 12. You may state the cost of the grates you have above mentioned at the time they were made and sold as you have before stated.

Ans. From January 1, 1876, to July 10, 1877,
The cost of the $3\frac{1}{2}$ and $7\frac{1}{2}$ C. F. was 40 cents each.
" " $4\frac{1}{2}$ " $8\frac{1}{2}$ " " 48 " "
" " $5\frac{1}{2}$ " 9 " " 52 " "
" " $7\frac{1}{2}$ N. C. " 49 " "
" " $8\frac{1}{2}$ " " 60 " "
" " 9 " " 63 " "

Between July 10, 1877, and May 18, 1878,
The cost of the $3\frac{1}{2}$ and $7\frac{1}{2}$ C. F. was $35\frac{1}{2}$ cents each.
" " $4\frac{1}{2}$ " $8\frac{1}{2}$ " " 45 " "
" " $5\frac{1}{2}$ " 9 " " 47 " "
" " $7\frac{1}{2}$ N. C. " 46 " "
" " $8\frac{1}{2}$ " " 55 " "
" " 9 " " 59 " "

Between May 15, 1878, and February 9, 1880, the cost the same as between January, 1876, and July, 1877.

Between February 9, 1880, and May 22, 1880,
The cost of the $3\frac{1}{2}$ and $7\frac{1}{2}$ C. F. was 45 cents each.
" " $4\frac{1}{2}$ " $8\frac{1}{2}$ " " 55 " "
" " $5\frac{1}{2}$ " 9 " " 59 " "
" " $7\frac{1}{2}$ N. C " 56 " "
" " $8\frac{1}{2}$ " " 68 " "
" " 9 " " 72 " "

70 Between March 22, 1880, and January 1, 1882, grates cost the same as between January 1, 1876, and July 10, 1877.

Ques. 13. Did you find on the defendants' books, which you examined, at what price said grates were sold for; if so please state such prices.

Ans. From January 1, 1876, to July 10, 1877, the prices at which they sold for was:
$3\frac{1}{2}$ and $7\frac{1}{2}$ C. F. and $7\frac{1}{2}$ N. C. $1.25 each.
$4\frac{1}{2}$ and $8\frac{1}{2}$ C. F. and $7\frac{1}{2}$ N. C. 1.50 "
$5\frac{1}{2}$ and 9 C. F. and 9 N. C. 1.75 "
From July 10th, 1877, to May 15, 1878, they sold:
$3\frac{1}{2}$ and $7\frac{1}{2}$ C. F. and N. C. $1.00 each.
$4\frac{1}{2}$ and $8\frac{1}{2}$ C. F. and N. C. 1.25 "

5½ and 9 C. F. and N. C. 1.50 each
From May 15, 1878, to February 9, 1880, they sold:
3½ and 7½ C. F. and N. C. for $1.20 each.
4½ and 8½ " " " " 1.35 "
5½ and 9 " " " " 1.50 "
From February 9, 1880, to March 22, 1880, they sold:
3½ and 7½ C. F. for $1.60 each.
4½ and 8½ " " 1.80 "
5½ and 9 " " 2.00 "
7½ N. C. " 1.70 "
8½ " " 2.00 "
9 " " 2.25 "
From March 22, 1880, to January 1, 1882, they sold:
3½ and 7½ for $1.45 each.
4½ and 8½ " 1.60 "
5½ and 9 " 1.75 "

The 455 grates called in my answer to question 7 Director, was a heavier grate and made a little differently from my grate called the Keep grate, but involved the same general principles of construction, but a little different in detail: the first and second, which are the principal claims of my patent No. 139,583, are infringed
71 by this grate; the profit on this grate due to my invention would be about the same as for the Keep grates made and sold immediately prior to January 1882, bearing the numbers marked N. C.

Adjourned by consent to February 19, 1884, 10 a. m.

Ques. 14. State whether or not the defendants produced all the books you called for under the stipulation in this case.

Ans. They did not. They did not produce the books from the branch houses which they had at Chicago, Cleveland and New York, nor any books showing the accounts. The books showed only a portion of the sales between January 1, 1879, and July 1, 1879. Nor did they produce any books showing sales of grates or parts of stoves in the city of Troy. They said these books had been burned in their store in 1883.

Ques. 15. State whether or not you were acquainted with the magnitude of the defendants' sales at their store in Troy.

Ans. I was so acquainted; they carried on a very large store at 255, 257 and 259 River street, Troy, N. Y.; sold parts of stoves, grates and stove fixtures to a large amount every year; one of the defendants said that the net proceeds of said sale at the store amounted to $30,000 a year.

Ques. 16. From your acquaintance with the business done at that store, how many grates called Keep grates, patent No. 139,583, were sold at that store by defendants per year between February 1, 1878, and January 1, 1882, and also between January 1, 1876, and February 1, 1878, of such grates known as 3½, 4½ and 5½?

Ans. I should think between the first dates there were 300 Keep grates sold per year, and it could not have been less than 150 per

year; during the second period mentioned there were prob-
72 ably 150 grates sold per year of the 3½, 4½ and 5½, and not less than 100.

Ques. 17. State, if you can, how many of said Keep grates the defendants must have sold between January and July, in the year 1879, which you failed to find an account of on the defendants' books, and how you obtained such number.

Ans. The number must have been about 400, and I obtained this number by comparing the sales for the corresponding months of the years immediately before and after 1879.

Ques. 18. State what, if any, experience you have had in the examination of patents relating to the various devices entering into the construction of stoves, and if you are familiar with and been in the habit of comparing such devices with alleged patents thereon.

Ans. I have; I have spent much time in the examination of such devices and patents relating thereto; I have obtained about twenty patents myself for my own inventions in various and different parts of stoves, and I have frequently examined various devices in stoves with relation to alleged patents thereon.

Ques. 19. State whether or not you are familiar with the details of the construction of stoves and the various parts thereof, and what, if any, experience you have had in the sale of stoves.

Ans. I have been engaged in construction of stoves for nineteen years, and am familiar with all the details of construction, and for six years was engaged in selling stoves as well as the manufacture.

Ques. 20. State, if you can, whether or not the patent No. 139,583, on the said Keep grates, is for the entire grate, or for only a portion of the grate.

Ans. The patent is on the entire grate; it is one entire device, and all covered by the patent.

73 Ques. 21. Are you familiar with letters patent No. 90756, bearing date June 1, 1869, and mentioned in the decree in this case?

Ans. I am.

Ques. 22. State, if you know, whether or not the defendants, between February 1, 1878, and January 1, 1882, made and sold the devices, or any of them, described and claimed in said patent, and to what extent, if you know; also, if you know, how you know.

Ans. I know they have; they have made the flue plate described and claimed in that patent between said dates, and the number so made and sold is 855; this I find by the said books, which I have examined; they must have made and sold more, as I failed to find the books which show the sales at their store in River street at that time, as I have before stated in relation to grates; they must have sold at that store between said dates 100 or more of said flue plates.

Ques. 23. State whether said patent 90756 is for such flue plates entire or only a portion thereon.

Ans. Yes, the patent is for the flue plate entire.

Ques. 24. Describe such flue plate, or its particular office in a stove in which it could be placed.

Ans. The flue plate was put in the Stewart stoves by the defendants, and were sold with that stove, or for that stove, but could have been applied as well to other cook stoves; the principal office of this flue plate was to throw the whole volume of heat directly against the oven bottom, and at the same time to afford room for the deposit of soot, &c., on the bottom of the stove; this flue plate was in form so described and constructed that it would resist any degree of heat brought against it, which was a very valuable improvement in flues for cook stoves, and was absolutely a necessity in the Stewart cook stove, because the flue theretofore used in the Stewart
74 cook would not resist the strong heat, but would settle down to the bottom of the stove rendering such stove useless, which materially damaged the reputation of the sale of the Stewart cook stove, especially in the West; this flue of mine entirely remedied the difficulty in the Stewart stove, and after my invention of this flue plate no Stewart stoves containing the old plate were made, but my flue plate was thereafter applied to all the Stewart stoves made.

Ques. 25. State to what extent, if you know, this flue plate described and claimed in said patent No. 90756 enhanced the selling value of the sale of Stewart stoves so made and sold by defendants, or to what extent it increased its market value, if you know.

Ans. In my judgment it increased its market value $1.50 per stove.

Ques. 26. Are you familiar with letters patent No. 90850, dated June 1, 1869, and mentioned in the decree in this action?

Ans. I am.

Ques. 27. State, if you can, whether the defendants between February 1, 1872, and January 1, 1882, made and sold any part of the devices described and claimed in said patent, and to what extent, if you know, and if you know, state how you know.

Ans. They did; they made and sold between said dates 392 raised hearths and doors described and claimed in claims 5 and 10 of said patent, and also 855 dampers described and claimed in claims 6 and 7 of said patent, and also 855 of the offset bottoms described in said patent and claimed in claims 8 and 9; this I find by the books of defendants, which I have examined; they must have made at least 100 more of these last-mentioned devices, but not having been able to obtain the books showing the sales at the store on River street I cannot speak more definitely.

75 Ques. 28. Now state, if you know, in what stoves these several devices last named were put by the defendants, and what office they performed in such stoves.

Ans. They were put in Stewart cook stoves; the office of the devices claimed in 5 and 10 were to heat the air entering into the fire chamber and to throw hot air into the oven, and claims 6 and 7 were for a damper to regulate the supply there, while claims 8 and 9 are for making a large ash pit; these devices were necessary to the success of this stove, because it was necessary, in order to meet the demands of the public for this stove that the ash pit be

enlarged, and that a dumping grate be substituted for the stationary one then in use, and these several devices then became necessary in making these changes.

Ques. 29. State if you can to what extent these several devices enhanced the market value of the said Stewart stoves, and, if so, how much or to what extent it increased the selling price of such stoves.

Ans. In the 392 stoves having the raised hearth and doors these devices increased the selling value or price 25 cents each, and in 855, having the devices described in said claims, 6, 7, 8 and 9, the selling value, or price, was increased 25 cents each.

Ques. 30. Are you familiar with letters patent reissue No. 4386, dated May 16, 1881, and mentioned in the decree in this action?

Ans. I am.

Ques. 31. State, if you know, whether the defendant between February 1st, 1878, and January 1, 1882, made and sold any of the devices described and claimed in said reissue, and if so what parts or devices, if any, and what extent, and if you know, state how you know?

Ans. They did make and sell between said dates 855 ash pans described and claimed in claim 15 in such reissue; these I
76 find from defendants' books, as I have before stated; about 100 more must have been sold at defendants' store on River street; I find no books of defendants which showed the amount of sales at the store; this ash pan was sold by the defendants in and for the Stewart stoves, but was just as applicable to other stoves.

Ques. 32. Describe this ash pan, or its particular features?

Ans. A bar extends across the center of the pan, making it very much stronger and more durable than others, and from this cross-bar to one end extended a bail, which made the pan easier to be handled than others.

Ques. 33. State, if you can, to what extent these improvements in the ash pan enhanced the selling price or value of the ash pan or stoves in which defendants put such ash pan?

Ans. It enhanced the selling price or value of the ash pan or stove in which they were placed 20 cents each.

Ques. 34. Are you familiar with design patent No. 8685, dated October 5, 1875, and mentioned in the decree in this case, and if so, describe the invention claimed in said patent?

Ans. I am; the invention is for a particular design, or configuration of a stove, and was made by me for a cook stove; this design was adopted by the defendants for the Stewart cook stove, and they have used this design on the Stewart cook stove since the issuing of the patent and up to the present.

Ques. 35. State, if you know, how many stoves having this design have the defendants made and sold between February 1, 1878, and January 1, 1882, and if you know, state how you know?

Ans. I find from the defendants' books, which I have examined as before stated, that they made and sold 855 such stoves, and

though I could not find the books to prove the same, yet there must have been 100 more sold at the store on River street.

77 Ques. 36. What extent, if any, did this design enhance the selling value or price of the stoves bearing this design made and sold by the defendants as above stated?

Ans. I should say 25 cents each.

Ques. 37. Are you familiar with letters patent No. 121,876, dated December 12, 1871, and mentioned in the decree in this case?

Ans. I am.

Ques 38. State, if you know, whether the defendants between February 1, 1878, and January 1, 1882, made and sold any of the devices described and claimed in said patent No. 121,876, and if not all devices, state which ones; also state the extent of such manufacture, and if you know, state how you know?

Ans. They made the device covered by claims 5 and 6, being a water-back for a stove; there were made of these 144; this number I find from the books of the defendants, which I have examined as I stated.

Ques. 39. State, if you can, what was the actual cost of each said water-backs to the defendants, and if you know, state how you know?

Ans. Sixty of such water-backs cost $1.40 each, and the remaining 84 cost $1.50 each; I know this from the books of the defendants, examined by me, as above stated, which show that Brown & Co. made such water-backs for the defendants.

Ques. 40. State, if you can, at what price the defendants sold such water-backs, and how you are able to state them?

Ans. The 60 sold for $3.00 each, and the 84 water-backs sold for $3.50 each, making a clear profit on the 60 of $1.60 each, and a clear profit on the 84 of $2.00 each; I know what the defendants sold them at from the books which I have examined, as before stated, upon which these sale prices are stated.

Ques. 41. State whether you have ever notified the defend-

78 ants to desist from manufacturing and selling the Keep grates spoken of, and the other devices described and claimed in the several letters patent mentioned by you and mentioned in the decree in this action; if so, state when.

Ans. I did on the 31st of December, 1875; I notified the defendants that they must not make or sell any of the devices named, described and claimed in any of the patents of mine mentioned in the decree in this case.

Cross-examination of witness waived for the present.

Adjourned to meet on notice.

TROY, N. Y., *January 13th*, 1885.

The parties met by consent before John M. Landon, master.

WILLIAM J. KEEP, recalled and cross-examined by Mr. GALE, testified as follows:

X Ques. 43. Were your relations with the defendants from 1868

to 1876 limited to your superintendence of the manufacture of the Stewart stoves?

Ans. Yes, sir, unless by making patterns on my own account.

X Ques. 44. As a fact that was your work with them?

Ans. Yes, sir, except that I had other business outside of that.

X Ques. 45. That was not any relation with them?

Ans. I think that is right.

X Ques. 46. I am speaking of your relations towards them?

Ans. Yes, sir.

X Ques. 47. You had the general superintendence of that manufactory—of the manufacture of these stoves?

Ans. I did.

79 X Ques. 48. You could, and did make such changes in them as you thought expedient?

Ans. Yes, sir.

X Ques. 49. At the time that you went there the Stewart stoves had been manufactured by them for a long number of years—for a great many years?

Ans. A stove called the Stewart stove—not this stove.

X Ques. 50. It was Stewart's stove?

Ans. The stove called the Stewart stove.

X Ques. 51. And it was then a stove well known in the market?

Ans. An old stove very well known.

X. Ques. 52. Do you know about how many of those stoves were then selling here?

Ans. I do.

X Ques. 53. About how many?

Ans. 1,700 the last year; I state this number only from memory.

X Ques. 54. In 1868?

Ans. About 1,700 in the year 1868.

X Ques. 55. If you want to show—when were the first changes made in the Stewart stove?

Ans. About the first of January, 1869; the stove was then considered made over—entirely made over.

X Ques. 56. And under your direction?

Ans. It was entirely made over under my direction.

X Ques. 57. And this involved the making of new patterns?

Ans. It did.

X Ques. 58. Have you got a statement of the number of stoves made, Mr. Keep?

Ans. No, I cannot tell you.

X Ques. 59. Have you got a statement for the year 1868?

Ans. I do not think so; I think I have got a memorandum of that date, of the number of stoves made.

80 X Ques. 60. When was the stove next changed?

Ans. In 1872 and '73; in the fall of 1872, also under my direction.

X Ques. 61. In that year, also, were the numbers changed?

Ans. They were changed in 1872, and numbered 7½, 8½ and 9.

X Ques. 62. Mr. Stewart died in 1868?

Ans. December 13th, 1868, Mr. Stewart died.

X Ques. 63. I ask if a coal grate was made for the stove of 1838 pattern?

Ans. No, that is an old, obsolete stove; I do not remember.

X Ques. 64. Was there a coal grate then made for 1851-'53 patterns?

Ans. No, sir; no grate made at that time that I now remember.

X Ques. 65. Was there any grate made for the 1859 pattern?

Ans. Not that I can now remember.

X Ques. 66. How many kinds of grates were made for the 3½, 4½ and 5½ 1869 patterns, which began in 1869?

Ans. There was a grate called the D. G. grate of 1869.

X Ques. 67. Was there not a grate made for that stove called "the long-bar Stewart"?

Ans. That is the grate I refer to.

X Ques. 68. That is the one, "D. G. 1869"?

Ans. Yes, sir.

X Ques. 69. Was there not also one known as "the short-bar Stewart"?

Ans. Not in the stove, at that date.

X Ques. 70. When was that grate introduced—the one called "the short-bar Stewart"?

Ans. I do not know of any called that, that was in the 1859 stove.

X Ques. 71. What was that called "short-bar Stewart"?

81 Ans. I do not think there was ever any called that; the name does not appear upon the books that I am aware of.

X Ques. 72. Were there not two kinds of grates used in the 3½, 4½ and 5½ 1869 stoves before 1872?

Ans. I do not think there were two kinds.

X Ques. 73. In the Stewart stove made in 1872 and 1873, with close and mica fronts, numbers 7½, 8½ and 9, how many kinds of grates were used?

Ans. One kind.

X Ques. 74. Only one?

Ans. One general kind only; some details different; one kind only.

X Ques. 75. Do you mean that there was only one kind of grate made that would fit in the 1869 patterns; was there then more than one grate that would fit in the 1869 patterns, 3½, 4½ and 5½?

Ans. After 1872 or 1873 there was a grate made then, the general pattern of 7½, 8½ and 9, which would fit the '69 stove, numbers 3½, 4½ and 5½.

X Ques. 76. Explain about the short and long bar grates.

Ans. The old Stewart stove of 1851 contained the Gardner grate, which could be called "short-bar Stewart grate," that was also called "Stewart shaking grate;" in 1869 a number of two-bar oscillating grate was made, which has always been called "D. G. 1869 grate;" in 1873 the Keep grate was introduced into both the 7½, 8½ and 9 stoves, and also adapted to the 3½, 4½ and 5½ '69 stoves, and after that date.

X Ques. 77. That was a short-bar grate?

Ans. The Keep grate was a short-bar grate, but not called so; in this same stove—1873—was put, for wood, a long-bar grate called "the wood grate," on their books; but I may say that all such grates were always designated by their numbers, 7½, 8½ and 9, to distinguish them from the wood grates that were previously made for the stoves.

82 X Ques. 78. Do the defendants' books show, when grates were ordered for the Stewart stoves, whether long or short bar grates were wanted or charged?

Ans. I do not know.

X Ques. 79. You examined those books?

Ans. Yes, sir; I did examine them, but not for any such purpose as that, and I do not know.

X Ques. 80. In your answer to question 5 you stated that the grate described in that patent—number 139,583, dated June 3d, 1873—was advertised as the Keep grate? Please produce any such advertisement, if you have one.

Ans. I have one circular of the defendants, which I produce, in which the Keep grate is named as "the Keep grate." In the circular there are four drawings of the Keep grate, and under the first of these grates the words, "coal grate, Keep pattern."

Same marked "Exhibit Circular."

X Ques. 81. You have no other now?

Ans. I have no other now.

X Ques. 82. No other advertisement?

Ans. No, sir.

The defendants object to so much of said answer to question 5 as states that in advertisement of Keep grate it was called "the Keep grate," as secondary evidence.

X Ques. 83. You stated in your direct evidence, in answer to question 7, that the defendants sold 2,426 Keep grates between January 1st, 1876, and July 10th, 1877. State under what names those grates were entered upon the defendants' books?

Ans. They were entered as 3½, 4½ and 5½, D. G., Stewart shaking grates. Plain grates.

X Ques. 84. Entered in that way?

Ans. Yes, sir; probably some of them were entered as coal grates. I cannot tell. That is the usual entry.

83 X Ques. 85. They were entered that way, and only that way?

Ans. No; I won't say that.

X Ques. 86. They were entered that way, the supposition is?

Ans. Yes, sir.

X Ques. 87. Is there any other entry indicating what grates they were?

Ans. There was some. I think there were one or two entries different somewhat from that, and might indicate more definitely what those were.

X Ques. 88. Then you say one or two entries made indicated further what grates they were?

Ans. May have been explanatory. For example: In sales book No. 1, page 202, under date of March 16th, 1876, there is entered a charge to W. T. Crook, Rouse's Point, such an entry was made, and in explanation of this entry it is spoken of as a "new pattern grate," and such new grate would fit the 1869 stove.

X Ques. 89. Is there any other instance?

Ans. I do not recollect any other instance.

X Ques. 90. You also stated in the same answer that between July 10th, 1877, and May 15th, 1878, the defendants sold 1,379 Keep grates. State how those grates were charged upon the defendants' books—the 3½, 4½ and 5½?

Ans. They were charged as 3½, 4½ and 5½, D. G. Stewart shaking grate, and the 7½, 8½ and 9, were charged as Stewart shaking grate with the prefix 7½, 8½ and 9, C. F.; or, as 7½, 8½ and 9, N. C. That, I believe, is the answer in full.

X Ques. 91. Do those charges otherwise indicate what grates they were?

Ans. That is all there was of those specific charges to indicate.

X Ques. 92. You can draw an inference from other charges?

Ans. Yes, sir.

84 X Ques. 93. In the same answer you stated that between May 15th, 1878, and February 9th, 1880, the defendants sold 3,384 Keep grates; state how those charges were made on defendants' books.

Ans. The last answer also answers this question.

X Ques. 93½. How were the grates sold by defendants between February 9th, 1880, and March 22d, 1880, entered on their books?

Ans. In the same way.

X Ques. 94. How were those sold between March 22d, 1880, and January 1st, 1882?

Ans. They were also entered in the same way, except the last three items of the answer, which were entered as "Director grates."

X Ques. 95. The grates that you have testified to as told by them, in answer to direct question 7, do the books show that those grates were sold separately from stoves?

Ans. The books indicate which were sold separately, and which in stoves; my answer to the question did not separate the grates, one from the other, but included both.

X Ques. 96. Can you state how many, and what of those grates, appear, by the books, to have been sold with stoves?

Ans. I cannot now do so, but will by tomorrow morning.

NOTE.—Under question 22, 875 is changed by consent to 855.

X Ques. 97. In your answer to question 9 you stated that of the grates sold by the defendants between January 1st, 1876, and February 1st, 1878, those designated 3½, 4½ and 5½ were sold for stoves orginally sold without such grates—are you able to say that any other grates were thus sold for stoves originally sold without such grates?

Ans. I do not know anything about it; I do not know of any such grates; I do not know positively that those grates that
85 I have mentioned—3½, 4½ and 5½—were sold for stoves that were originally sold without such grates; but I do know, that none of these 3½, 4½ and 5½ grates, that I have mentioned, were sold to go in stoves unless they were originally sold with other grates than those in them.

X Ques. 98. After you left the defendants were you engaged in the making of stoves?

Ans. I was.

X Ques. 99. Where, in Troy?

Ans. Both in Troy and afterwards in West Troy, my address was always Troy, my residence.

X Ques. 100. Did you make a cooking range called the Rubicon?

Ans. I did.

X Ques. 101. Did that contain any of the patented devices incorporated in the Stewart stove of 1869 and '70?

Ans. It contained the Keep grate patented in 1873?

X Ques. 102. Anything else contained in the Stewarts?

Ans. I think nothing else, unless it was the flue plate of 1869.

X Ques. 103. Did those Rubicon ranges have a large sale?

Ans. As large as any range sold under the same circumstances.

X Ques. 104. About how many?

Ans. I do not know how many.

X Ques. 105. How long did you continue to manufacture those ranges?

Ans. From the time that I left the defendants until 1881.

X Ques. 106. Give us some idea about how many of those Rubicon ranges you made?

Ans. I shall have to decline to state; I do know about how many; I decline to state the number; I do not care to state how much business I did.

Hearing adjourned until 2 o'clock p. m.

86 2 O'CLOCK P. M.

Parties appeared as before.

WILLIAM J. KEEP, recalled, and cross-examination resumed by Mr. GALE:

X Ques. 107. You have stated in your cross-examination how the grates referred to in your answer to question 7, were charged on the defendants' books—state now, fully and particularly, the facts from which you testified in answer to said question 7, that the grates in that answer referred to were the so-called Keep grates.

Ans. There were only three kinds of grates made, the old wood grate, the two-bar grate of 1869 and the Keep grate; that is all the grates there were; the charges in the books are there for the D. G. Stewart snaking grate, 1869 pattern, and if the wood grate is ordered it is always designated as the wood grate, and when the Keep grate is mentioned it is called, or designated, or referred to as the

3½, 4½ or 5½ D. G. shaking grate; the difference in the entries for those two grates is simply the figures "1869;" those were the original grates with two bars, the old bar grate; those two entries that I have referred to on the books, March 16th, 1876, is this entry for Crook of Rouse's Point; I think that the entry is for the 3½, 4½ or 5½ Stewart shaking grate D. G.; under that charge it is marked "ex" explanatory; I suppose it is, that this grate is a new pattern, but it will fit; this entry was in sales book number 1, page 202; then for another I refer back to sales book, the same entry, under the charge October 3d, 1876, Letch & Sautell, Fitchburg, Mass., charged: 1 8½ Stewart shaking grate and under that a memorandum stating, we never made the two-bar grate for 8½ Stewart, showing in both cases that that charge, in that shape, meant the Keep grate.

87 X Ques. 108. Have you memoranda of the entries you found in defendants' books, and from which you gave the answer you did to question 7?

Ans. I have.

X Ques. 109. State fully, and in detail, the various entries you thus found in defendants' books, and which are condensed in your answer to question 7.

Schedule of account to be made and hereinafter annexed, marked "Schedule," and which is to be presented as an answer to the last question.

Schedule herewith presented.

Proposed question by Mr. DAVENPORT:

Ques. Explain your answer to question 9?

Ans. I do not know now where those grates—3½, 4½ and 5½—went, nor into what stoves they were put, but I do know that Fuller, Warren & Company made no other stoves that those grates would fit, except the stoves numbers 3½, 4½ and 5½, and such stoves I know were never sold by them with those grates in originally.

Hearing adjourned without date.

United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP
against
JOSEPH W. FULLER, JOHN HOBART WARREN, GEORGE A. WELLS and WALTER P. WARREN.

In the matter of the accounting of defendants before J. M. Landon, master, under a decree of this court in this case filed March 20th, 1883.

88 Appearances: For complainant, Nelson Davenport; for defendants, William E. Hagan.

The parties by their respective attorneys appeared before me June 23d, 1885.

Defendants' Testimony.

It is understood that exceptions follow all rulings upon objections.

The defendants produced as a witness WALTER P. WARREN, who being duly sworn. to interrogatories propounded to him did make answers as follows:

Examined by Mr. HAGAN:

Ques. 1. What is your name, age, residence and occupation?

Ans. Walter P. Warren, age 44; residence, Troy, N. Y.; occupation, vice-president of the Fuller & Warren Company.

Ques. 2. How long have you been engaged in the stove business, Mr. Warren?

Ans. Since 1871.

Ques. 3. You are one of the defendants in this case?

Ans. I am.

Ques. 4. Do you know William J. Keep, the complainant herein, and if so, how long have you known him?

Ans. I have known him since 1871.

Ques. 5. Did your firm of Fuller, Warren & Co. ever have any business connection with him, and if so, what was the nature of such business connection?

Ans. He was employed jointly by Fuller, Warren & Co. and Mrs. P. P. Stewart to superintend the construction of what was called "Stewart stoves."

89 Ques. 6. You may state whether Mrs. P. P. Stewart was the executrix of Philo P. Stewart.

Ans. Yes, she was.

Ques. 7. Were there any papers in writing, or agreement made, between you and Mr. Keep and Mrs. Stewart as to what the duties of said Keep were?

Ans. Yes, sir.

Ques. 8. (Presenting paper dated March 31, 1869.) Look at the paper now shown you and state what it is, what it relates to.

Complainant objects. Question withdrawn.

Ques. 9. Is this the agreement referred to in your last answer?

Ans. Yes, sir; one of the agreements.

Mr. HAGAN: We offer in evidence the agreement, and the master is asked to mark the same.

Mr. DAVENPORT: Complainant's counsel objects to the paper being received in evidence, on the ground it is immaterial and irrelevant on this accounting. There is no allegation of payment of royalties in the answer, which is the ground upon which it is offered, and therefore it is entirely incompetent upon this accounting to prove payment of royalties. Complainant further interposes the objection that this matter has been all determined by stipulation of the parties and by the decree in the case.

Mr. HAGAN: And I reply that the matter has been changed by the testimony of Mr. Keep, which has made this necessary.

Same received and marked, "Defendants' Ex. No. 1."

Mr. HAGAN: I find on reading this agreement that it refers
90 for details to two agreements made with Fuller, Warren & Co. and P. P. Stewart, and I offer those in evidence for the same purposes as the agreement foregoing was offered. They are agreements between Fuller, Warren & Co. and P. P. Stewart, and each bear date of November 2d, 1868.

Mr. DAVENPORT: Complainant's counsel objects as immaterial, irrelevant, incompetent, and the execution is not proved, and that the whole matter is covered by the stipulation of the parties.

Received subject to the condition that their authenticity be hereafter proved.

Same marked "Defendants' Ex. No. 2" and "Defendants' Ex. No. 3."

Ques. 10. You are acquainted with the sale of the Stewart stoves from February 1, 1869, down to December 31, 1881?

Ans. I am.

Ques. 11. During what year between the dates mentioned in the last question did the Stewart stoves containing the alleged Keep improvement have their largest sale, if you know?

Ans. I will have to refer to some of these data I have here. (Looking at same.)

Complainant's counsel objects to the question on the ground that by the stipulation of the parties this accounting for infringement of the stove patents does not go back of February 1, 1878, and therefore such evidence is immaterial.

Objection overruled.

Ans. In 1870 they had their largest sale.

Ques. 12. To what, in your opinion, was this increased sale due at that time?

Ans. The increased sale in 1870 was due to the advertisements that Fuller, Warren & Co. made in regard to Mr. Keep's alleged
91 improvements, that they were to be incorporated in the stove, and it produced a larger sale than the year previous for samples of those goods to our former customers.

Ques. 13. What was the effect of the introduction of these improvements upon that stove the second year after that, or the succeeding years?

Ans. It very materially reduced the sale of the stoves.

Ques. 14. How much? Give the years down to 1873.

Ans. In 1870, the sale of the stoves amounted to 4,410. In 1871, 3,054. In 1872, 2,761.

Mr. HAGEN: You may stop there.

Mr. DAVENPORT: From what is the witness reading?

The WITNESS: From a memorandum extract from Fuller, War-

ren & Co. books, made by Mr. Viets, the present treasurer of the Fuller & Warren Company.

Mr. DAVENPORT: Then I object to it.

Ques. 15. Have you examined it to know whether it is correct?

Ans. I helped him in the examination.

Ques. 16. Do you believe it to be correct?

Ans. I know it to be correct, sir. I can state why.

Ques. 17. You made an examination in order to be correct?

Ans. Yes, sir.

Mr. DAVENPORT: Complainant's counsel objects to it as not a memorandum made by the witness.

The WITNESS: I stood over him and helped copy it off.

Ques. 18. You didn't do the manual work, but superintended it?

Ans. I called off the things, and got the books down,
92 and helped look it over, and I know it is a memorandum from which these royalties were paid to Mr. Stewart's estate.

The MASTER: I think I will admit it.

The WITNESS: I can correct my evidence and say that I made it myself.

Mr. HAGAN: We will follow it up by Mr. Viets.

Ques. 19. Did Mr. Keep in the year 1872 and 1873 add any alleged improvements in addition to the Stewart stove?

Ans. He did.

Ques. 20. What was the effect of those improvements upon the sale of the stoves subsequently?

Ans. The effect was to decrease the sale.

Ques. 21. How do you know?

Ans. From the amount of goods manufactured and sold, and the royalties paid.

Ques. 22. What memorandum have you for determining that?

Ans. Memorandum taken from Fuller, Warren & Co.'s books.

Ques. 23. By whom?

Ans. By myself.

Ques. 24. Can you give the number of stoves each year following 1873 which you sold?

Ans. Yes, sir.

Ques. 25. Please state them in their order.

Ans. In 1873, 2997. In 1874, 2006. In 1875, 1141. In 1876, 475. In 1877, 363. In 1878, 354. In 1879, 245. In 1880, 207. In 1881, 137.

Ques. 26. You can stop there. To what was this decline in the sale of the Stewart stove due in your opinion?

Ans. To the alleged improvements which Mr. Keep placed upon the stoves.

Ques. 27. Did you have any of these stoves sent back on account of these alleged improvements?

Ans. A great many.

93 Ques. 28. Would it be possible for you to name how many?

Ans. It was over a thousand; I would like to correct that after looking at my memorandum; I can prove conclusively from our books over 565 Stewart stoves which were returned, which embodied Mr. Keep's alleged improvements; what made me speak of 1,000 was that the cost of returning such stoves amounted to over $1,000; I now see it is $1,800.

Ques. 29. You lost $1,800 on stoves on account of those alleged improvements of Mr. Keep's?

Ans. Well, we think we lost more; the cost of returning them to Troy was $1,885.

Ques. 30. On those 565 stoves?

Ans. Yes, sir; transportation and handling, &c.

Ques. 31. The grates of this pattern which you made were made to apply to what was known as the "Stewart stove," with the exception of the few made for the "Director," wer-n't they?

Ans. Yes, sir.

Ques. —. What value would these grates have apart from their being attachments to a Stewart stove?

Ans. They have no market value except for old iron.

Ques. 33. It was the fact that they were a part of the Stewart stove that gave them any value at all over and above cast iron?

Ans. Yes, sir; entirely.

Ques. 34. They were not as you made them and sold them an independent construction?

Ans. No, sir.

Ques. 35. They could not be used in any other stove without altering, could they?

Ans. No, sir.

Ques. 36. So, as a whole, they had no value excepting as an attachment and a part of the Stewart stove for which they were constructed?

94 Ans. No, sir; no value whatever, except for old iron.

Ques. 37. Did you make a loss upon these stoves which were returned?

Ans. Yes, sir.

Ques. 38. On account of the Keep improvements; didn't you state in your other answer that these stoves were defective and returned on account of the alleged improvements?

Ans. Yes, sir; when returned they had to be sold at less than market price of such stoves to get rid of them.

Ques. 39. Then you suffered a further loss on that account, independent of the cost of returning them?

Ans. Yes, sir.

Ques. 40. You have admitted the infringement of letters patent No. 90756 for flue plates, and Mr. Keep claims you have sold 975 stoves containing them, and that they increased the market value of such stoves $1.50 each. Now, what is the fact as to increasing the value of those stoves by the addition of those flue plates?

Ans. I think it rapidly decreased the market value of the stoves.

Ques. 41. Were you able to sell them for $1.50 more than you would other stoves of the same class in the market?

Ans. No, sir.

Ques. 42. You could not?

Ans. No, sir.

Ques. 43. Then you don't think it enhanced the value of those stoves at all?

Ans. No, sir.

Ques. 44. Mr. Keep states that you sold of raised hearths and doors, patent No. 90850, 390 hearths and doors, and he claims that they increased the market value of the stove 25 cents each; were you enabled by the addition to the Stewart stoves of the
95 raised hearths and doors named in the patent 90850 to sell such stoves for 25 cents more than you would have sold ordinary stoves or stoves of the ordinary value without those improvements?

Ans. They didn't add 25 cents to the selling character in the market.

Ques. 45. What was their effect upon the stove?

Ans. The effect of the raised hearth was to decrease the value of the stove in the market.

Ques. 46. Mr. Keep testifies that you sold between Feb. 1, 1873, and Jan. 1, 1874, 855 bottoms and dampers made under the patent 90850, and he claims that the addition of those to the stove increased its value 25 cents?

Ans. Do you mean the offset bottom that come down that way (indicating) and the diamond-shaped flue.

Ques. 47. Yes; in your opinion did this add to the value of that stove at all?

Ans. It did not add to the marketable value.

Ques. 48. Were you enabled to sell them for 25 cents more than you could have sold the same stove for without those improvements and the ordinary means of construction therein?

Ans. No, sir.

Ques. 49. Mr. Keep claims you sold between February 1, 1878, and January 1, 1882, 866 ash pans, and claims that the addition of his improvement thereto increased the value of the ash pans 20 cents each; is that correct?

Ans. That is his testimony; the ash pan wasn't worth 20 cents without the handle.

Ques. 50. What did it sell for?

Ans. About 20 cents handle and all, I guess.

Ques. 51. Was there in use at that time the ordinary infolding bail for ash pans?

Ans. Yes, sir, if I recollect right; oh, yes; I know it was certainly.

96 Ques. 52. What would be the cost comparatively between using the ordinary ash-pan bail and the Keep improvement covered by reissue 4386?

Ans. The relative cost in manufacturing I suppose without the royalty he talks of there would——

Ques. 53. (Interrupting.) I mean the actual cost.

Ans. Four or five cents more I suppose the cost of manufacturing it would be.

Ques. 54. You couldn't sell them for any more with it added?

Ans. No, sir; we couldn't sell it for so much; it was a detriment to the stove.

Ques. 55. What were the difficulties of the ash pan which were objectionable and fatal to its use?

Ans. It became so hot and covered with ashes that it was almost inoperative; it was right under the fire, and was covered with ashes; I should say perhaps it cost a little more to manufacture than I said; all this (indicating) is malleable iron.

Ques. 56. Between February 1, 1878, and January 1, 1882, Mr. Keep claims you made 955 stoves under the design, patent number 8685, and that this design increased the value of the stove twenty-five cents each.

Ans. That is the design for the front doors and the oven doors; I remember the patent.

Ques. 57. What was the fact as to its increasing the value of the stove?

Ans. It didn't increase the value of the stove over others in market of the same character.

Ques. 58. Were you enabled to sell it for twenty-five cents more than you would with any designs that were in use at that time?

Ans. No, sir.

Ques. 59. How many kind of grates for the Stewart stove, if you know, as made and sold by Fuller, Warren & Co. after February 1, 1876?

Ans. Three or four principal kinds.

Ques. 60. Please name them as they are charged on your books.

97 Ans. There was the long-bar Stewart grate, the short-bar Stewart grate and the wood grate; there was a grate called the Gardiner grate, but very few of them were made at that time.

Ques. 61. In advertising these grates for the Stewart stove in what way were they generally designated?

Complainant's counsel objects.

Further examination of the witness is here suspended.

L. W. DRAKE, having been duly sworn, was interrogated and did make answer as follows:

Examined by Mr. HAGAN:

Ques. 1. What is your name, age, residence and occupation?

Ans. L. W. Drake, age 36; residence, Troy; occupation, assistant superintendent of the Fuller & Warren stove works.

Ques. 2. How long have you been engaged with Fuller, Warren & Co.?

Ans. I have been with them now nearly nineteen years, which time includes the time with the Fuller & Warren Co.

Ques. 3. What was your occupation with Fuller, Warren & Co. from 1869 to December 31, 1881?

Ans. I was timekeeper and shipper from 1869 to 1881, when I became assistant superintendent.

Ques. 4. Do you know what is called the keep grate?

Ans. Yes, sir.

Ques. 5. Do you know what is called the long-bar Stewart grate?

Ans. Yes, sir.

Ques. 6. And the two-bar grate?

Ans. Yes.

98 Ques. 7. What other grates besides the last two named did Fuller, Warren & Co. make in 1869?

Ans. The Stewart stoves in general.

Ques. 8. Yes.

Ans. There was the Gardiner, the two-bar grate, the short-bar grate and wood grates.

Ques. 9. Did you continue to make and sell these grates from 1869 to December 31, 1881?

Ans. Yes, sir.

Ques. 10. Have you compared the statement of Mr. Keep, furnished in answer to cross-question 10, with the sales books of Fuller, Warren & Co., as to the accuracy of the number of grates stated to have been sold by them as appeared in that statement of Mr. Keep?

Ans. I have.

Ques. 11. Do you find it to be accurate, or nearly accurate?

Ans. I find it is not accurate.

Ques. 12. I find on sheet 71, of Mr. Keep's answer to cross-question 10, the following to occur: From 1876 to 1877 there were sold 199 No. 3½ grates. What do those books show to be the number of grates sold during that time?

Ans. Sixty-nine.

Ques. 13. Then the difference between Mr. Keep's statement of 199 and your account shows there were but 69 sold?

Ans. Yes, sir.

Ques. 14. During the same time Mr. Keep states on sheet 71 of his answer to that question that there were 931 4½ grates sold. How does your record upon the books appear as to the number sold in that period?

Ans. Three hundred and thirty-three.

Ques. 15. As against 931 stated by Mr. Keep?

Ans. Yes, sir.

Ques. 16. I find on page 71 of Mr. Keep's answer, that he states that from 1876 to 1877 there were 1,296 No. 5½-inch grates sold.

99 Ans. I find there were 548.

Ques. 17. As against 1,296 stated by Mr. Keep?

Ans. Yes, sir.

Ques. 18. From 1877 to 1878 Mr. Keep states on page 71 that there were 199 3½-inch grates sold during that period. How do you find it to be?

Ans. I find 82.

Ques. 19. As compared with 199 stated by Mr. Keep?

Ans. Yes, sir.

Ques. 20. From 1877 to 1878, on page 71, of the 4½ grates, there were 530 sold by defendants. How do you find the record to be in that respect?

Ans. 274.

Ques. 21. As against his report of 530?

Ans. Yes, sir.

Ques. 22. From 1877 to 1878, he states on page 71 that of the 5½-inch grates there were 589 sold. How do you find the fact to be on examination of the books?

Ans. 345.

Ques. 23. As against 589 charged by Mr. Keep?

Ans. Yes, sir.

Ques. 24. During that same period, on page 71, Mr. Keep reports 47 No. 9 grates. How do you find the record to be?

Ans. I find 19 9's as C. F. or N. C.

Ques. 25. He says there are two N. C. 8½ grates.

Ans. I find 26.

Ques. 26. From 1878 to 1880, on page 71 of his answer to cross-question 10, he states that the firm sold of three and a half inch grates 192. How do you find the record to be in regard to that on the books?

Ans. 129.

Ques. 27. As against 192 reported by Mr. Keep?

Ans. Yes, sir.

Ques. 28. Between 1878 and 1880, he reports on page 71, 100 that the defendants sold 1,010 four and a half inch grates. How do you find the record to be in regard to that?

Ans. 582.

Ques. 29. Then it is 582 as compared with 1,010 reported by Mr. Keep?

Ans. Yes, sir.

Ques. 30. From 1878 to 1880, he charges that the defendants sold 1,146 of the five and a half inch grates, how do you find the books to be?

Ans. 628.

Ques. 31. As compared with 1,146 of the kind of grate reported by Mr. Keep?

Ans. Yes, sir.

Ques. 32. He reports on page 71, from 1878 to 1880, that 81 of the 7½ C. F. grates were sold?

Ans. I find three.

Ques. 33. From 1878 to 1880 he charges on page 71 the defendants with having sold 226 C. F. eight and a half inch grates; how do you find the fact to be as regards that?

Ans. 45.

Ques. 34. During the same period he charges on page 71 that of the No. 8 C. F. grates the defendants sold 208; what is the fact?

Ans. 67.

Ques. 35. 67 as compared with 208 charged by him?

Ans. Yes, sir.

Ques. 36. During the same period he charges that you sold 53 of the N. C. 7½ grates, how do you find that fact to be?

Ans. Seven.

Ques. 37. Seven as compared with 53?

Ans. Yes, sir.

Ques. 38. During the same period he charges you on page 71 with having sold 236 8½-inch grates; how do you find the fact to be?

Ans. 92 N. C.

Ques. 39. As compared with 236 charged by him?

101 Ans. Yes, sir.

Ques. 40. During the same period he charges that you sold 232 N. C. No. 9; how do you find the fact to be upon the books?

Ans. 151.

Ques. 41. As compared with 232 charged by him?

Ans. Yes, sir.

Ques. 42. From 1880 to 1880 he charges that you sold 12 of the 3½-inch grates; can you tell what he means by "'80 to '80"?

Ans. No, sir; I can't tell anything about it.

Ques. 43. From '80 to '82 he states you sold 15 No. 9 grates?

Ans. I find seven.

Ques. 44. From 1880 to 1882 he charges that you sold 231 three and a half inch grates?

Ans. 140.

Ques. 45. Compared with 231, which he states?

Ans. Yes, sir.

Ques. 46. From 1880 to 1882 he charges that you sold 947 four and a half inch grates; how does that compare with the books you have examined?

Ans. 543.

Ques. 47. It is 543 as compared with 947 charged by him?

Ans. Yes, sir.

Ques. 48. Between 1880 and 1882 he charges that you sold 913 five and a half inch grates?

Ans. I find 551.

Ques. 49. 551 as compared with 913 charged by Mr. Keep?

Ans. Yes, sir.

Ques. 50. Between 1880 and 1882 he charges you sold 95 of the seven and a half C. F.?

Ans. 64.

Ques. 51. 64 as compared with 95 charged?

Ans. Yes, sir.

102 Ques. 52. Between 1880 and 1882, upon page 71, he charges that you sold 210 eight and a half C. F. grates; how do you find it?

Ans. 127.

Ques. 53. Between 1880 and 1882, at page 71, he charges that you sold 239 of the No. 9 C. F. grates; what do you find?

Ans. 76.

Ques. 54. 76 as compared with 239 charged?

Ans. Yes, sir,

Ques. 55. Between 1880 and 1882 he charges that you sold 15 No. 7½ N. C. grates?

Ans. I find 12.

Ques. 56. At the same time he charges that you sold 95 No. 8½ N. C.?

Ans. I find 83.

Ques. 57. At the same time he charges that the defendants sold 175 No. 9 N. C.?

Ans. I find 104.

Ques. 58. Did you examine these "Director" grates?

Ans. No, sir.

Ques. 59. In answer to direct question 7 Mr. Keep states: "I have examined defendants' books under the stipulation before spoken of, that is, their books in the office at Troy, but not the books of their branch houses, and I find on these books at the Troy office that the defendants made and sold these so-called Keep grates under patent 139,583, between January 1, 1876, and July 10, 1877:

"199 of No. 3½ of such grates.
"931 " 4½ " "
"1,296 " 5½ " "

Have you examined the books of Fuller, Warren & Co. which were in the possession of Mr. Keep, and from which he made those examinations, and did you find anything upon them which would enable him to determine what those grates were, whether long-bar or short-bar, or what they were?

Ans. In some instances; as a general thing the books don't show.

103 Ques. 60. What is the fact generally?

Ans. They are marked as "D. G. S." grates.

Ques. 61. "D. G. S." grates would include what kind of grates?

Ans. Either the long or short bar grate.

Ques. 62. The long-bar grate was not the Keep grate?

Ans. No, sir.

Ques. 63. It was a grate which would fit either of those stoves?

Ans. Yes, sir.

Ques. 64. So you can't tell from the books whether the grates named in the interim stated in that question were long-bar, short-bar or Keep, or what kind of grate?

Ans. No, sir; not positively.

Ques. 65. All the grates which passed through your hands as shipper were grates sold by the firm as repairs, wern't they?

Ans. Yes, sir.

Ques. 66. You took no account of the grates made for stoves, which were sold in stoves?

Ans. No, sir.

Ques. 67. So that all the grates which passed through your hands were grates sold for repairs?

Ans. No, sir.

Ques. 68. In how many instances, if you remember, was there any designation of grates occurring through that period by which you could distinguish what kind of grates were sold?

Ans. I couldn't tell exactly; I found quite a number through the books where there were called '73 grates and '69 grates.

Ques. 69. It was not the general practice to so designate them during that period on the books?

Ans. No, sir.

Q. 70. It would be impossible for any person to tell whether they were Keep grates, or what they were?

104 Ans. Yes, sir.

Ques. 71. You know other grates were sold besides the Keep grate during that time largely?

Ans. I do.

Ques. 72. Between July 10, 1877, and May 15, 1878, he reports there were sold of such grates

199 of No. 3½.
530 " 4½.
589 " 5½.
1 " 7½ C. F.
22 " 8½ C. F.
47 " 9 C. F.
2 " 8½ N. C.
9 " 9 C. F.

Of the 199, 3½, of the 530, 4½ and of the 589 No. 5½, named in that answer, is there anything on the books which would designate whether they were Keep, long-bar, or other grates used for the Stewart stoves?

Ans. No, sir; only a few instances.

Ques. 73. Between May 15, 1876, and Feb. 9, 1880, he states that you sold

192 of 3½ of such grates.
1,010 " 4½ " "
1,146 " 5½ " "

Now, have you examined the books in regard to those entries?

Ans. Yes, sir.

Ques. 74. Where they are designated as 3½, 4½, and 5½ of such grates, can you tell whether they are long-bar, or Keep grates?

Ans. No, sir.

Ques. 75. Could anybody in your opinion?

Ans. No, sir.

Ques. 76. Between February 9, 1880, and March 22, 1882, Mr. Keep states that they sold

12 of No. 3½ of such grates.
33 " 4½ " "
115 of No. 5½ of such grates.

105 Thus designated by number could you tell or could any one tell what kind of grates they were, whether long-bar or Keep grates, or what kind of grate?

Ans. No, sir; I think not.

Ques. 77. Between March 22, 1880, and January 1, 1882, Mr. Keep states that he found the firm sold

231 of No. 3½ of such grates.
947 " 4½ " "
913 " 5½ " "

Upon the books of the company with those grates designated as No. 3½, 4½, and 5½, could you tell whether they were Keep grates, long-bar grates or other grates of the Stewart stove?

Ans. No, sir.

Ques. 78. Could anybody tell?

Ans. No, sir.

Ques. 79. These grates were all made to be applied to the Stewart stove?

Ans. Yes, sir.

Ques. 80. They were not adapted to apply to any other stove, were they?

Ans. No, sir.

Ques. 81. What value would those grates have as an entirety apart from their being constructed to attach to the Stewart stove?

Plaintiff objects.

Ans. No value other than old iron.

Complainant objects that there is no evidence that witness is competent to testify as to value.

Objection overruled.

Ques. 82. Is there anything on the books of Fuller, Warren & Co. by which you or anybody else could tell, in your opinion, whether the grates sold as long or short bar grates were applied to old stoves in which other forms of grate had been used?

106 Ans. There is nothing on the books to show.

Ques. 83. They would fit in those stoves?

Ans. Yes, sir.

Ques. 84. In your experience do you know what is the life of a grate for the Stewart stove ordinarily?

Ans. About one year.

Cross-examined by Mr. DAVENPORT:

X Ques. 85. State what books you examined to get the data you have given?

Ans. I examined the sales books.

X Ques. 86. Anything else?

Ans. No, sir.

X Ques. 87. By whom were they kept?

Ans. They run through Mr. Hamblin's hands, Mr. Adams, and Mr. Woods.

X Ques. 88. They were not kept by yourself?

Ans. No, sir.

X Ques. 89. Are you a practical book-keeper?

Ans. No, sir.

X Ques. 90. Nor an expert?

Ans. No, sir.

X Ques. 91. Did you ever examine these books before?

Ans. No, sir.

X Ques. 92. Do you know what books Mr. Keep examined?

Ans. I believe he examined the same books I did?

X Ques. 93. Do you know?

Ans. I was told that he did.

X Ques. 94. Well, do you know?

Ans. I couldn't swear positively he did.

X Ques. 95. You don't know then?

Ans. No, sir.

X Ques. 96. You were shipper from 1869 to 1881?

Ans. Yes, sir; I took charge of the shipping department in 1870.

X Ques. 97. Have you a distinct recollection of what is called the Keep grate?

107 A. Yes, sir.

X Ques. 98. Can you give an idea of how many of those grates passed through your hands from 1876 to 1877, during the year 1876?

Ans. No, sir.

X Ques. 99. You can't give any idea?

Ans. No, sir.

X Ques. 100. You can't say whether it was one or a thousand?

Ans. No, sir.

X Ques. 101. Can you give any idea for any year?

Ans. Yes, sir.

X Ques. 102. Can you say whether they were shipped in large or small quantity?

Ans. They were shipped in both large and small quantity; that is, from one up to 50.

X Ques. 103. I mean was there a large quantity shipped in each year, or only a small quantity?

Ans. Well, I would say a good many.

X Ques. 104. Can you give any idea as to how many were shipped in any one year?

Ans. No, sir.

X Ques. 105. What is your judgment for any one year as to the number shipped?

Ans. I don't know that I could give any real judgment, because they passed through my hands in small orders, or from one to 50; it would be just mere guess-work.

X Ques. 106. You handled them a good many years, and you ought to be able to say about how many were shipped, whether one or a million, or 10,000 in a year; give me your best judgment as to the number shipped in any one year while you were shipper?

Ans. Of which grate do you speak?

X Ques. 107. I mean the Keep grate?

Ans. I couldn't give any idea, because we shipped both kinds; we kept the long-bar and short-bar grates in stock, and some

108 parties had one, some had another; sometimes, if we were out of one, we would replace the long-bar with the short-bar, and if out of the short-bar we would send the long-bar in place of it; so it would be almost impossible to make any kind of an estimate.

X Ques. 108. Can you give any idea of the number of grates you shipped of all kinds in any one year?

Ans. Outside of Stewart grates?

X Ques. 109. All kinds of grates for stoves.

Ans. It would run up probably 2,000 or 3,000 grates in a year; there was a Gardiner grate; that I can give you a better idea of if you ask me about it, because we manufactured and sold less than 1,500 or 1,600, or sometimes 2,000, grates of that kind a year.

X Ques. 110. Do you know how many of the Keep grate they manufactured in any one year?

Ans. No, sir.

X Ques. 111. No way of telling?

Ans. No, sir.

X Ques. 112. The grates that passed through your hands were merely for repairs?

Ans. Yes, sir.

X Ques. 113. What do you mean by "repairs"?

Ans. To replace grates that were worn out.

X Ques. 114. How would the order come to you?

Ans. It came from the store.

X Ques. 115. To do what? To ship so many grates?

Ans. Yes, sir.

X Ques. 116. To such a place?

Ans. Yes, sir.

X Ques. 117. How do you know they were for repairs?

Ans. Well, I don't know.

X Ques. 118. Well, the fact is that you were directed to ship so many grates to such a place?

Ans. Yes, sir.

109 X Ques. 119. That's all you know about it?

Ans. Yes, sir.

X Ques. 120. Do you know whether the number and kind of grate shipped was always entered upon the sales book of which you speak or not?

Ans. Well, they are supposed to be entered upon the sales book.

X Ques. 121. You know nothing about it only you suppose it to be so?

Ans. Yes, I suppose it to be so.

X Ques. 122. Do you know anything about the different styles of the Stewart stove?

Ans. Yes, of the grates which fitted into the patterns of 1869 there were two; that is, coal grates—one known as the long bar and one as the short bar.

X Ques. 123. What did the designation of four and a half and five and a half, &c., mean?

Ans. Referred to the 1869 stove; referred to the 1869 stove when the order, for instance, called for a three and a half D. G. Stewart S. grate.

X Ques. 124. What does "D. G." mean?

Ans. Dumping grate.

X Ques. 125. That was the long grate?

Ans. Yes, sir.

X Ques. 126. And the short grate was not?

Ans. The short-bar grate and the long-bar grate were both D. G. grates.

X Ques. 127. To what pattern did the higher numbers belong—6½, 7½, 8½ and 9?

—. There were short and long bar grates for them; as a general thing they were either designated as C. F. or N. C.

X Ques. 128. What was designated?

Ans. The grates.

X Ques. 129. I mean what stoves were those grates for?

Ans. The '73 pattern; '72 and '73 pattern.

110 X Ques. 130. Do you mean that Nos. 6½, 7½, and 8½ were not sold for any stoves except for the pattern of '73?

Ans. That's it.

X Ques. 131. And the 3½, 4½, and 5½ were for the '69 pattern?

Ans. Yes; where they were designated as D. G. grates.

X Ques. 132. And if they were not designated as D. G. grates, then what?

Ans. They went for the '59 pattern.

X Ques. 133. Did the 3½, 4½, and 5½ belong to the '73 pattern at all?

Ans. No, sir.

X Ques. 134. What, then, did the Keep grate fit?

Ans. The Keep grate would fit the '69 and '73 pattern.

X Ques. 135. Do you know when you first began to ship the Keep grate?

Ans. About 1873.

X Ques. 136. Was the Gardner grate and the short-bar Stewart grate one and the same?

Ans. We didn't call the Gardner the short-bar grate. They were always called the Stewart shaking grate; the only short-bar grate was known as the Keep grate.

X Ques. 137. Then the Keep grate fitted the 7½, 8½, and 9 and the 3½, 4½, and 5½?

Ans. Yes, sir.

X Ques. 138. The wood grate you have spoken of belonged to the stove made for wood only?

Ans. Yes, sir.

X Ques. 139. And were designated as wood grates?

Ans. Yes, sir.

X Ques. 140. Some parties used them for coal, but they were always called the wood grate.

X Ques. 141. Were they numbered at all?

Ans. Yes; the wood grates were numbered.

X Ques. 142. 7½, 8½, and 9?

111 Ans. Yes, sir.

X Ques. 143. But the wood grates, 7½, 8½ and 9, would not fit the '69 pattern?

Ans. There was one that would fit it and there was one that would not fit it.

X Ques. 144. Wouldn't they fit the '73 pattern?

Ans. The '69 grate would fit the '73 pattern.

X Ques. 145. I mean of the 7½, 8½ and 9?

Ans. Yes, they would fit the '73 pattern.

X Ques. 146. And the '69 pattern?

Ans. No, sir; there was a wood grate that was used in the '73 pattern that would fit the '69 pattern, and there was one used in the '73 pattern that would not fit the '69 pattern; there were two styles, one called the dumping grate and the other the plain grate.

X Ques. 147. In what way were the orders for grates given you; I mean whether in writing or otherwise?

Ans. In writing.

X Ques. 148. Orders for the shipping of the grates were given to you in writing?

Ans. Yes, sir.

X Ques. 149. Did those orders designate the specific grate to be shipped?

Ans. Sometimes they did.

X Ques. 150. If they did not, how did you know what grates were to be shipped?

Ans. There were certain customers that would take one kind, and others who would not; we would ship whichever we had in stock.

X Ques. 151. What became of the orders you received?

Ans. They were sent back to the store after the shipments were made.

X Ques. 152. Have you examined them?

Ans. No, sir; they were destroyed by fire, and I have not examined them.

X Ques. 153. Destroyed when?

112 Ans. When the River-street house burned down in February, 1883.

X Ques. 154. Now state when you found an entry on the book of grates 3½, 4½ and 5½, what grates they designated, as you understand.

Ans. I couldn't tell which grate; all I know is, they were dumping grates and Stewart shaking grates—those worded in that way; that's all I could tell about them.

X Ques. 155. All you could tell about them was that they were numbered 3½, 4½ and 5½?

Ans. Yes, sir; that's all.

X Ques. 156. Do you know what stoves or what pattern grates 3½, 4½ and 5½ were sold for?

Ans. For the '69 pattern.

X Ques. 157. Did the manufacture of the '69 pattern cease at any time, and if so, when?

Ans. The '69 pattern was discontinued in 1872.

X Ques. 158. In your examination did you find on the books any grates which were not designated at all?

Ans. Yes, sir.

X Ques. 159. Either by number or for what stove were they designed?

Ans. They were all designated by number, 3½, 4½ and 5½.

X Ques. 160. I asked you, from your examination of the books did you find any grates which were not designated at all?

Ans. I found where they were marked 7½, 8½ and 9; there were two kinds; there was a close front and a mica front.

X Ques. 161. There were some instances where they were not marked C. F. or N. C.?

Ans. I couldn't tell which stove they were sent for.

X Ques. 162. All the grates you saw on the books bore some mark?

113 Ans. Yes, sir; but they were marked 3½, 4½, and 5½, and they were marked D. G. S. grate; except occasionally we would find them marked '73 or '69 pattern.

X Ques. 163. Do you know that an account of these grates is kept upon other books of the defendants' besides the sales books?

Ans. Not after they were shipped; the order before it came to me, was copied in what is called the "order book," and when the order left me it went back to the store and was charged on the sales books.

X Ques. 164 Is that the only book it would appear on?

Ans. Yes, sir; the orders were then filed away.

X Ques. 165. You don't mean to say no other books contained any account of these grates?

Ans. Nothing more than the total footings of the man's account.

X Ques. 166. Wasn't it charged on some other book?

Ans. They were charged from the sales book to the ledger.

X Ques. 167. Then there were other books upon which they appeared?

Ans. They would not appear as grates, but only appear as merchandise to his account.

X Ques. 168. Was there any other data or memorandum, or any papers or books, submitted to you for examination than those sales books?

Ans. No, sir.

X Ques. 169. By whom were they given to you?

Ans. When I examined the books I got them from the vault.

X Ques. 170. Did you compare the pages?

Ans. I compared each page on each book.

X Ques. 171. Is the page marked on the exhibit?

114 Ans. No, sir; but the dates I went by; I went according to the dates; the pages here do not correspond with the pages of the books; it calls attention to the book in one or two instances.

X Q. 172. Did you examine the order book at all?

Ans. No, sir.

X Ques. 173. Didn't you find in the papers of the plaintiff some reference to an order book?

Ans. I found the first page here referred to the order book.

X Ques. 174. Why didn't you examine the order book?

Ans. For this reason: that page showed the grates that had been ordered; that was for the month of January; the next month (February) was taken from the sales book; these orders might have been carried over and not shipped until February.

X Ques. 175. They might or might not?

Ans. Yes; they might or might not; sometimes along in January we would have been closed down, and been short of goods, and help them over until starting up in February.

X Ques. 176. How were Keep grates designated, as you understand it?

Ans. 1873 short-bar grate.

X Ques. 177. On the sales books were they so designated?

Ans. In some cases they were marked '73 pattern, and when they were so marked we knew they were the Keep grate.

X Ques. 178. How else would they be marked upon the books?

Ans. That's the only way I found them marked.

X Ques. 179. You say that from 1876 to 1877 you only found 69 No. 3½ grates?

Ans. Yes, sir.

X Ques. 180. Did you find any that were not numbered under that date?

Ans. No, sir; they were all numbered 3½.

115 *Afternoon Session.*

X Ques. 181. Did you examine any books which showed the number of grates shipped or sold to agents?

Ans. I examined no books except the sales books.

X Ques. 182. Did you examine any books that showed the number of grates shipped to their branch houses?

Ans. I did not; I examined nothing only what was sold.

X Ques. 183. Did you examine any books which showed the number sold at the store?

Ans. No, sir.

X Ques. 184. Then the examination, so far as you made it, did not show the number of grates sold?

Ans. It did not show the number sold at retail at the store.

X Ques. 185. Nor sold by the branch houses?

Ans. No, sir.

X Ques. 186. In going over the complainant's statement did you mark upon such statement the items you failed to find upon the books?

Ans. I marked "Can't find" there.

X Ques. 187. Where you failed to find the items on his account you marked in pencil "Can't find"?

Ans. Yes, sir.

X Ques. 188. And those marks, "Error" and "Can't find," upon the complainant's statement are yours?

Ans. Yes, sir.

X Ques. 189. Did you mark upon this account all these items which you failed to find?

Ans. I think I marked them all.

X Ques. 190. And the pencil marks across the figures——

Ans. (Interrupting.) Where they are not marked you will find the pencil mark drawn through.

X Ques. 191. The pencil marks drawn through the ink figures are yours?

116 Ans. Yes, sir.

X Ques. 192. Whose figures are these on the margin?

Ans. Those are the plaintiff's; my marks are all in pencil.

X Ques. 193. On page 9 of complainant's statement I find the figures "2," "4½," meaning two grates, No. 4½, opposite of which you have marked "Not D. G.;" what does "Not D. G." mean?

Ans. Not dumping grate.

X Ques. 194. Did the book you examined show in any other way that it was not a dumping grate except that it was not marked D. G.?

Ans. That's the only way.

X Ques. 195. And if not marked "D. G." what did you assume the grate to be?

Ans. Stewart shaking grate.

X Ques. 196. Is that the Gardiner grate?

Ans. Yes, sir.

X Ques. 197. And if marked "D. G." what did you assume it to be?

Ans. I assumed it to be either the '69 or '73 long or short bar grate.

X Ques. 198. Did you include in your examination the grates marked on complainant's statement as "Director" grates?

Ans. No, sir, I did not.

X Ques. 199. You referred on your direct examination to complainant's statement, page 71; is that a recapitulation?

Ans. Yes, I presume it is.

X Ques. 200. You understand page 71 to be a recapitulation of the statements contained in the pages from one to seventy inclusive?

Ans. Yes, sir.

X Ques. 201. How many sales books did you examine?

Ans. Individually?

X Ques. 202. Yes.

117 Ans. I think there was about a dozen that I examined.

X Ques. 203. Did you examine all the sales books from which you have made the computation spoken of in your testimony?

Ans. No, sir; I didn't examine them all myself.

X Ques. 204. Who did examine those you didn't examine?

Ans. William Gregg, James Brown, Joseph Mackey and W. Rogers.

X Ques. 205. Then you derive your information as to the numbers of grates which you have given on your direct examination from the statements made by those parties you have named?

Ans. From their check-marks on the plaintiff's statement.

X Ques. 206. You say there were about a dozen of those books in all?

Ans. No, about 12 that I examined myself.

X Ques. 207. How many books are there in all containing these accounts you have given?

Ans. I think they run to about 18, 18 or 19; somewheres around there.

X Ques. 208. Of which you examined personally about 12?

Ans. Yes, somewheres in that neighborhood.

X Ques. 209. You stated that these grates for any other purpose than use in the Stewart stoves would be of no value except for old iron. Is that so?

Mr. HAGAN: That is hardly as he stated it.

Ans. According to my knowledge of the grates, and what they were used for, I don't see what else they could be used for, except to apply to the Stewart stove; I don't know of any other stove that they would fit.

X Ques. 210. Can you say there was no other stove which they would fit?

Ans. No other to my knowledge.

118 X Ques. 211. Do you know whether there was any other stove on the market which they would fit?

Ans. No, sir; I do not.

X Ques. 212. Now, if in the complainant's statement the grates which you have marked as "not found," or erased in pencil, were deducted from the complainant's statement in his recapitulation they would correspond with the numbers which you have given, as you understand it?

Ans. No, sir; they would not.

X Ques. 213. Why not?

Ans. Because he has double in his recapitulation what I found, and there was not half deducted that we did not find.

X Ques. 214. Then you did not mark "not found," or erased from the complainant's statement all the grates which you failed to find on the books?

Ans. Did not erase all that we failed to find? We erased all we failed to find; either erased them or marked them in pencil.

X Ques. 215. If you deduct from the complainant's statement which he has made, or which you have marked as "not found," or which you erased in pencil, it would correspond with the books, as you understand it?

Ans. No, sir; I think not. I think he has got other grates included in there; where he found them I can't say. In his recapitulation he has other grates included in there besides what is on those sheets.

X Ques. 216. On these sheets you think he has other grates which you did not find?

Ans. Yes, and which the sheets don't show.

X Ques. 217. You have stated that you marked on the complain-

ant's statement all the grates which you failed to find as "not found" or erased in pencil?

Ans. Yes, sir.

119 X Ques. 218. If you deduct from his statement those which you have marked as "not found," or erased, would the balance correspond with the figures you gave on your direct examination?

Ans. No, I think not.

X Ques. 219. Why not? Would they correspond with the statement he has made if you take out all you have marked?

A. Because he has grates included in there that are not on these sheets.

X Ques. 220. Grates included where?

Ans. In his recapitulation.

X Ques. 221. I am not speaking of the recapitulation at all, but I say in this statement.

A. I understand now what you mean.

X Ques. 222. Exclusive of the recapitulation I mean; you think it would correspond with the statement you have given on your direct examination?

A. Yes, sir.

X Ques. 223. Did you figure up the numbers shown on his statement to see whether his recapitulation was correct or not?

A. I did; well, I didn't figure it up for that purpose; I figured it up to see how near it would correspond with my figures.

X Ques. 224. And from the fact that the statement did not correspond with your figures you conclude that the recapitulation is incorrect?

Ans. Yes, sir.

X Ques. 225. Upon the sales books which you examined, did you check the items on the books?

Ans. No, sir.

X Ques. 226. Then the checks upon the statement of complainant, which you made, of course, do not correspond with any checks upon your sales books?

Ans. No, sir.

120 X Ques. 227. Then as you found an item upon the sales book from this statement you checked it upon the statement?

Ans. Yes, sir.

X Ques. 228. And passed along without making any check upon the book?

Ans. Yes, sir.

X Ques. 229. Did you examine these sales books without reference to the complainant's statement?

Ans. No, sir.

X Ques. 230. Did you go over the books to see whether any grates were sold at other dates than the dates given on the complainant's statement?

Ans. No, sir.

X Ques. 231. And did your examination of the books go so far

as to show that there were no sales appearing upon the books which did not appear upon the complainant's statement?

Ans. Yes, sir.

X Ques. 232. Then you are able to say that the complainant's statement covers all the grates which appear on the sales books?

Ans. It does not cover all.

X Ques. 233. All that are marked here?

Ans. Yes, sir.

X Ques. 234. All that are designated by the marks here?

Ans. Well, no; there were some grates that are not on there at all, that he didn't have on; they are in my statement, though.

X Ques. 235. You have included them in your statement, though?

Ans. Yes, sir.

X Ques. 236. Did you examine the sales books for sales on dates other than the dates mentioned in complainant's statement?

Ans. No, sir; I merely started with the first of the month and continued down through the month; took what sales there were for each kind of grate.

121 X Ques. 237. Where are those books now?

Ans. In the vault at the defendants' works.

X Ques. 238. These sales books do not show the grates which were put into stoves?

Ans. No, sir.

Direct examination resumed.

By Mr. HAGAN:

Ques. 239. Which of the twelve out of the eighteen sales books did you examine that you testified to?

Ans. I examined all of the first year (1876); I think there were about four in that year; I examined some during other years; then I examined most of 1880; I don't positively know that there were twelve in all. I couldn't say exactly, because I didn't keep any track of them; I had to work at them at odd times.

Ques. 240. You had nothing to do with the manufacture of stoves, did you?

A. No, sir.

Ques. 241. And the grates of which you have given an account were sold separately and independent of the stoves in every case?

Ans. Yes, sir.

Ques. 242. Where grates are sold without the stoves what are they termed in the trade?

Complainant's counsel objects.

Ques. 243. I will modify the question; when grates, plates, and parts of stoves are shipped independent of stoves what are they termed in the trade?

Ans. "Repairs."

Ques. 244. After the entry has been made on the shipping book and checked off, what is done with it?

Ans. Sent to the store to be compared with the sales book.

Ques. 245. Whose duty is that?

122 Ans. The entry clerk.

Ques. 246. Who was the entry clerk, if you know, from 1869 to 1876?

Ans. Mr. Hazzard was entry clerk part of the time.

Ques. 247. Where is he?

Ans. He is dead. Mr. Adams was entry clerk and he is also dead. Myron Hamblin took Mr. Adams's place and he is dead; then Robert Wood succeeded.

Ques. 248. Do you remember what year Wood had charge of it?

Ans. From about 1880 up to last year.

Ques. 249. That includes after Dec. 31, 1881?

Ans. Yes, sir.

Ques. 250. Mr. Keep in answer to question 24 in regard to the flue-plate patent 9756, stated that it was put in the Stewart stove by the defendants and was sold for that stove, but it could have been applied as well to other cook stoves; is that true, as it was made and sold by you?

Ans. It could not have been applied to any other stove we made without reconstructing the stove.

Ques. 251. That flue plate was made expressly for the Stewart stove, wasn't it?

Ans. Yes, sir.

Ques. 252. And could not be applied to any other stoves that you know of without reconstructing?

Ans. No, sir.

Ques. 253. Mr. Keep testifies in answer to question 31 in regard to the ash-pan patent: "This ash pan was sold by the defendants in and for the Stewart stove, but was just as applicable to other stoves." Is that so?

Ans. It would not fit any stove that Fuller, Warren & Co. made other than the Stewart.

Ques. 254. Did you ever know any case in stove manufacture where the ash pan could be made to fit into any other stove unless made by the same person?

Ans. No, sir.

123 Cross-examination resumed.

By Mr. DAVENPORT:

X Ques. 255. You do not mean to state, do you, that the flue plate spoken of by you in your redirect examination would not fit any other stove on the market?

Ans. No, sir; I don't know anything about stoves outside of Fuller, Warren & Co.'s make.

X Ques. 256. Do you mean to say that the ash pan just spoken of in your redirect examination would not fit any other stove?

Ans. Would not fit any other stove made by Fuller, Warren & Co.

X Ques. 257. Do you remember when Fuller, Warren & Co. made the imitation stove of the Stewart stove?

Ans. Yes, sir; in 1867.

X Ques. 258. Did this ash pan fit that?

Ans. No, sir.

X Ques. 259. Nor the flue plate?

Ans. No, sir.

Further hearing adjourned to Saturday, June 27th, 1885, at 10 a. m.

Further hearing adjourned to July 15, 16, and 17, 1885.

TROY, N. Y., *July 15th*, 1885.

All parties met agreeable to adjournment, and the hearing was resumed as follows:

L. W. DRAKE recalled and resumed upon the direct examination.

Examined by Mr. HAGAN:

Ques. 260. (Indicating grate.) State, if you know, what that grate is?

124 Ans. That is a 4½ D. G. short-bar grate; sold and marked on the books as a D. G. grate.

Ques. 261. Is that the Keep grate also?

Ans. Yes, sir; it is what is known as the Keep grate; it was also known as the 1873 grate; it is marked, "Patented June 3, 1873."

The grate is offered in evidence, and the master is requested to mark the same, and the same is hereupon marked, "Defendants' Ex. Keep Grate, Patented June 3, 1873, No. 139,583."

Ques. 262. (Indicating grate.) Please look at the grate now shown you and state what it is.

Ans. That is a 4½ D. G. long-bar grate.

Ques. 263. Is that a Keep grate?

Ans. No, sir; it is an 1869 grate; it is known as the D. G. long-bar, or 1869 grate.

The grate is offered in evidence, and the master is requested to mark the same, and the same is hereupon marked "Defendants' Ex. Long-bar, 1869."

Ques. 264. (Indicating same.) Look at the grate frame now shown you and state what it represents?

Ans. That represents an 8½ close-front, short-bar grate frame.

The grate frame is offered in evidence, and the master is requested to mark the same, and the same is hereupon marked "Defendants' Ex. 8½ Close-front, Short-bar Grate Frame."

Ques. 265. (Indicatieg same.) What is the frame now shown you?

Ans. 8½ non-clinker, short-bar grate frame, or, as it is generally abbreviated, "N. C."

The grate is offered in evidence, and the master is requested to mark the same, and the same is hereupon marked "Defendants' Ex. 8½ Non-clinker, Short-bar Grate Frame."

125 Ques. 266. (Indicating same.) I show you a stove-bottom plate, bottom-oven flue plate; state what that is.

Ans. That represents the 1869 and 1873 off-set bottom of the Stewart cooking stove, and bottom-oven flue plate.

Ques. 267. Patent number what?

Ans. It does not seem to be marked.

The plate is offered in evidence, and the master is requested to mark the same, and the same is hereupon marked "Defendants' Ex. Bottom-oven Plate and Stove Bottom of Stewart Cooking Stove of 1869 and 1873 Patent."

Ques. 268. (Indicating same.) Look at the ash drawer now shown you and state what it is.

Ans. It is the ash pan for the 1869 and 1873 Stewart stove.

Ques. 269. Known as the Keep ash pan?

Ans. Yes, sir.

The ash pan is offered in evidence, and the same is hereupon marked "Defendants' Ex. Keep Ash Pan for Stewart Stove."

Ques. 270. When you were last examined you stated that you had based an examination which you gave upon the sales books of the number of grates of all kinds disposed of by Fuller, Warren & Co., and that part of the account which you made up from those books was the work of others; since you last gave your testimony have you personally made an examination of all those books?

Ans. Yes, sir; I have.

Ques. 271. Do you find anything in your last examination to change the character of the statement you made before, and if so, what?

Ans. I found some errors that would decrease the statement I made of the number of grates.

Ques. 272. How much?

126 Ans. 104 on the total.

Ques. 273. In what years did you find this difference, as between your former statement and as you now make it?

Ans. It was in different years from 1877 up through to 1881.

Ques. 274. At cross-question 174 you were asked: "Why didn't you examine the order book"? What book would be the best book to get an accurate account of the sales made by Fuller, Warren & Co. of the grates referred to?

Ans. Sales book.

Ques. 275. If you took part from the order book and part from the sales book what would be the difficulty?

Ans. There would be a duplicating of the grates.

Ques. 276. Goods were entered on the order book and when sold were charged on the sales book?

Ans. Yes, sir.

Ques. 277. So that the sales book would be an accurate account of what was sold, and the order book would not?

Ans. The order book would not; the order book, of course, would contain the countermanded orders, and there might be orders countermanded.

Ques. 278. At X Ques. 173 you were asked, and answered as follows: "Do you know that an account of these grates is kept upon other books of the defendants besides the sales books? Ans. Not after they were shipped; the order before it came to me was copied in what is called the 'order book,' and when the order left me it went back to the store and was charged on the sales book." Do you wish to amend that answer in any way?

Ans. I do; after they were shipped a copy of the order was entered upon the shipping book; the order was then sent to the store, where the bill of goods was invoiced and entered upon the sales book.

127 Ques. 279. At X Ques. 98 and 99 you were asked if you could tell, or give any idea, "how many of those grates passed through your hands from 1876 to 1877, during the year 1876"?

Mr. DAVENPORT: Let the question stand as for the year 1876.

Ques. 280. At X Q. 99, and 100, 101 you were asked as follows: "Q. 99. You can't give any idea? Ans. No, sir. X Ques. 100. You can't say whether it was one or a thousand? Ans. No, sir. X Ques. 101. Can you give any idea for any year? Ans. Yes, sir." Do you wish to correct your answer as to X Ques. 101?

Ans. I do; my answer should be, no, sir.

Ques. 281. At X Ques. 149 you were asked as follows: "Did those orders designate the specific grate to be shipped? Ans. Sometimes they did. X Ques. 150. If they did not, how did you know what grates were to be shipped? Ans. There were certain customers that would take one kind and others who would not; we would ship whichever we had in stock." Do you wish to correct that answer?

Ans. I do; the answer should read that there were certain customers who would take either kind and others who would not; we would ship to some customers whichever we had in stock.

Recross-examination.

By Mr. DAVENPORT:

X Ques. 282. What is the difference in the frames of "Ex. Keep Grate," "Ex. 4½ D. G. Long Bar," and "Ex. 8½ Close-front, Short Bar"?

Ans. Well, one wouldn't fit the other stove.

X Ques. 283. What is the difference in the frames of these three?

Ans. That (indicating) is a 4½ D. G., and that would fit the '69 only.

128 X Ques. 284. Is there any difference in the sizes?

Ans. That (indicating) is an 8½.

X Ques. 285. Is there any difference in the sizes?

Ans. Yes, there is a difference in the sizes, as the stoves are numbered.

X Ques. 286. There is a difference in the sizes of the grates?

Ans. Yes, sir.

X Ques. 287. Any difference in the size of these two frames?

Ans. No, sir; there is no difference; they are both 8½; only one is to fit a close front and the other a mica front; no difference in the two 8½'s.

X Ques. 288. What is the difference I want to know between the frames themselves of these 4½'s?

Ans. The difference is in the shape.

X Ques. 289. What difference do you find between the frames of the so-called Keep grate and the 4½ D. G. long bar?

Ans There is no difference in the outside construction; the difference is in the inside construction of the frame.

X Ques. 290. What difference do you find between the frames of the so-called Keep grate and the 8½ close-front short-bar grate?

Ans. There is a difference in the outside construction.

X Ques. 291. What is it?

Ans. The difference is in the "lip" at the end for holding the shaker; one has a "lip" and the other has not.

X Ques. 292. What difference do you find between the so-called Keep grate and the non-clinker 8½ frames?

Ans. They are both Keep's.

X Ques. 293. The 8½ non-clinker and the 8½ close front are both Keep grate frames?

Ans. Yes, sir.

129 X Ques. 294. Please examine the four grate exhibits, or grate frames, and say which are stamped as "patented June 3, 1873."

Ans. I find the 4½ D. G. short bar is marked "patented June 3, 1873;" I find the 8½ 1873 short-bar bed plate marked "patented June 3, 1873;" I find the 8½ non-clinker short-bar grate marked "W. J. Keep's patent, June 3, 1873;" I find the 4½, 1869 grate marked "4½, '69."

X Ques. 295. In whose account did you find an error of 104 grates; in your own or that of some of the other parties who examined?

Ans. In the other parties; I didn't re-examine my own account.

X Ques. 296. What were these 104 grates that you say there was a mistake about?

Ans. Some of them were the Stewart shaking grate, known as the Gardiner grate, and some of them were the 1869 pattern grate.

X Ques. 297. Anything else?

Ans. That's all; nothing else that I remember of.

X Ques. 298. Did you examine to see if they had found all the grates of the Keep kind?

Ans. Yes, sir.

X Ques. 299. Where are those books now?

Ans. In the vault at the works.

The complainant's counsel calls upon the defendants' counsel to deliver to the examiner for examination such books containing the account made by Mr. Keep, and defendants' counsel agrees to produce them.

X Ques. 300. How did you ascertain that your statement in relation to the books which would show the number of grates made was incorrect?

Ans. I ascertained by examining the books and checking off each item as I found it on the books, and comparing it with Mr. Keep's statement, where I found that there were grates that
130 were not on Mr. Keep's statement I added them to his statement, and you will find them on there in lead-pencil mark.

X Ques. 301. On your direct examination of today you corrected the answer to cross-question 163; please state how you ascertained you had made that error.

Ans. By examining my testimony today.

X Ques. 302. Your attention was not called to it by any one else?

Ans. No, sir.

X Ques. 303. Do you mean to be understood as saying that the sales books contained an accurate account of the sales of the Keep grate?

Ans. The only grate account that Fuller & Warren had; all credit sales were entered upon the sales book; cash sales, of course, the sales book would not show.

X Ques. 304. It would not show cash sales?

Ans. No, sir.

X Ques. 305. What book would show cash sales?

Ans. Well, the petty cash would show cash sales, but I don't know that it would show the grates; it would only show the amount of merchandise.

X Ques. 306. Have you examined the petty cash?

Ans. No, sir.

X Ques. 307. Did this sales book show the number of Keep grates manufactured?

Ans. No, sir.

X Ques. 308. What book would show it?

Ans. No book.

X Ques. 309. Can you give a fair estimate of the proportion of grates sold, as appears upon the sales book, to the number manufactured?

Ans. No, sir; I could not.

X Ques. 310. Were not a great many more manufactured than were sold than appear upon the sales book?

Defendant objects that there is no evidence that witness knows what was manufactured there.

131 Ans. There probably were some more.

X Ques. 311. Not many more?

Ans. Well, I couldn't say as to how many.

X Ques. 312. What proportion?

Ans. I couldn't say as to the proportion either; some more, and that's about all I could say.

X Ques. 313. Did the grates which went into the hands of their branch houses appear upon the sales book?

Ans. No, sir.

X Ques. 314. How many branch houses had they in the year spoken of, and where were they located?

Ans. At one time there were three branch houses—New York, Cleveland and Chicago.

X Ques. 315. What branch houses had they in the years 1876 to 1881?

Ans. They had all part of the time; the New York house was done away with along about 1880, or somewheres thereabouts.

X Ques. 316. Those were the branch houses during those years, except the New York house, which was discontinued about 1880?

Ans. Yes, sir.

X Ques. 317. Was the Cleveland house in existence from 1876 on?

Ans. Yes, sir.

X Ques. 318. What number of stoves were sent to these branch houses, can you give some idea?

Ans. No, sir; I could not.

X Ques. 319. Can you estimate the number of grates sent to the New York house?

Ans. No, sir.

X Ques. 320. You were the shipper during these years?

Ans. Yes, sir.

X Ques. 321. Did you ship goods to these branch houses?

Ans. I did.

132 X Ques. 322. And could give no idea as to how many stoves you shipped to either of those branch houses during any one year?

Ans. No, sir, not in proportion.

X Ques. 323. I said any number?

Ans. No, sir; I couldn't give any number.

X Ques. 324–325. You can't give any idea of the magnitude of the business done by the branch houses?

Ans. No, sir.

X Ques. 326. Were there as many as 500 stoves shipped a year to each of the branch houses?

Ans. There might have been 500, and there might have been more and there might have been less.

X Ques. 327. Were there as many of the Keep grate shipped to these branch houses, in your judgment, as there were stoves shipped, or more?

Ans. Well, I should judge there must have been about as many grates as there were stoves.

X Ques. 328. Keep grates I speak of?

Ans. I couldn't say they were all Keep grates.

X Ques. 329. Were there, in your judgment, as many or more of the Keep grates shipped to those branch houses as there were shipped stoves?

Ans. I don't know.

X Ques. 330. Being the shipper during those years can't you say whether there were at least 500 Keep grates shipped to each of those branch houses between the years 1876 and 1881?

Ans. I can't say.

X Ques. 331. Don't you think there were more than 500?

Ans. I can't say positively.

X Ques. 332. I didn't ask you positively, but for your best judgment?

Ans. I don't know.

X Ques. 333. Were there 300 a year shipped to each of those branch houses during that time?

Ans. I can't say.

133 X Ques. 334. Were there 200?

Ans. I can't say.

Defendants' counsel objects to these questions as immaterial, unless it is proven these grates were put into stoves made subsequent to 1876.

Objection withdrawn.

X Ques. 335. In your judgment were there 100 of the Keep grates shipped to each of these branch houses per year between 1876 and 1881?

Ans. I can't say.

X Ques. 336. Was there one grate shipped to each of these houses per year?

Ans. I think there was.

X Ques. 337. Do you think there were two?

Ans. Yes, I think there might have been two.

X Ques. 338. Might there have been three?

Ans. Yes, sir; there might have been three.

X Ques. 339. Might there have been 100?

Ans. I can't say as to that.

X Ques. 340. Can you say as to 50?

Ans. There might have been.

X Ques. 341. Can you say as to 75?

Ans. No, sir; I can't.

X Ques. 342. Do you mean to say that between the years 1876 and 1880 there might have been 50 of the Keep grates shipped to each of these branch houses per year, but cannot say as to 75 grates per year?

Ans. There might have been 50, but I can't say positively as to there being 75.

X Ques. 343. You were the only shipper there?

Ans. During that time, with the exception of probably a week or two.

X Ques. 344. As you were the sole shipper for the defendants

between the years 1876 and 1881 you were constantly handling the Keep grates, I suppose, wer-n't you?

134 Ans. Not personally; I had nothing more to do with it than passing the orders to the men and copying them on the book, and oversight.

X Ques. 345. You had charge of them anyway; you had supervision of the shipping?

Ans. Yes, sir.

X Ques. 346. Are you not able to give a closer statement as between 50 per year and 75 to each of these branch houses than that?

Ans. No, sir; I cannot without guessing at it, and that I don't want to do.

X Ques. 347. Isn't it your best judgment that you shipped to each of these branch houses a great many more than 100 per year of the Keep grates?

Ans. I can't say positively as to that.

X Ques. 348. Give your best judgment?

Ans. We were in the habit of shipping short and long bar grates, but I can't say positively which we shipped the most of to the branch houses.

X Ques. 349. I do not ask you to state positively, but would like your best judgment.

Ans. To the best of my judgment I think we shipped somewheres in the neighborhood of 50 Keep grates to each of the branch houses; it might have been more and it might have been less.

X Ques. 350. Do these sales books which you examined show the number of the Keep grates delivered at the store in River street?

Ans. No, sir.

X Ques. 351. You said that the cash sales of these grates did not appear upon the sales book?

Ans. Yes, sir; well, in some cases they might, but not in all cases.

X Ques. 352. Where were these cash sales made?

Ans. At the store.

X Ques. 353. Sometimes at the foundry?

Ans. What was sold to the men at the works.

X Ques. 354. What book will show the number of Keep grates sold at the store?

135 Ans. No book that I know of.

X Ques. 355. Have you been told by Mr. Warren, one of the defendants, that there were no books which would show these sales at the store?

Ans. No, sir.

X Ques. 356. Who directed the delivery of these Keep grates from the foundry to the store; I mean, did they pass through your hands at all?

Ans. In some cases they did and in some cases they did not.

X Ques. 357. Between the years 1876 and 1881 how many of these Keep grates do you think you sold per year at the store?

Ans. I can't say.

X Ques. 358. Have you no data from which you can give a judgment?

Ans. No, sir.

X Ques. 359. During those years they were doing a large retail business, weren't they?

Ans. Yes, sir.

X Ques. 360. In stoves and "repairs"?

—. ——.

X Ques. 361. And they were selling at the store the Keep grates as well as other grates, weren't they?

Ans. Yes, sir.

Redirect examination.

By Mr. HAGAN:

Ques. 362. Did you have anything to do with the manufacturing of those grates?

Ans. No, sir.

Ques. 363. You don't know how many were made?

Ans. No, sir.

Ques. 364. None of the books which were under your control would show it?

Ans. No, sir.

Ques. 365. The sales-book would not show it?

136 Ans. No, sir.

Ques. 366. Is there anything upon the books which were in your charge which would show how many grates were shipped to branch houses from which you could form an opinion?

Ans. The shipping book.

Ques. 367. Would that show the grates shipped to branch houses?

Ans. Yes, sir.

Ques. 368. Your place is at the foundry?

Ans. Yes, sir.

Ques. 369. Did you have anything to do with selling goods at the store?

Ans. No, sir.

Ques. 370. What you stated about their doing a large retail business is merely from heresay?

Ans. Yes, sir.

Ques. 371. When you were asked who directed the delivery of the Keep grate at the store that you have testified to, did you mean Keep grates of all kinds?

Ans. Keep grates.

Recross-examination.

By Mr. DAVENPORT:

X Ques. 372. You have just stated on your last direct examination that the shipping books will show the number of Keep grates delivered to branch houses, have you?

Ans. Show the number shipped to branch houses; I don't know

that I said they would show the number of Keep grates shipped there.

X Ques. 373. Have you examined those shipping books to see?

Ans. I have not.

X Ques. 374. Why do you think the shipping books will show the number of grates shipped to branch houses?

137 Ans. I am in the habit of entering the number shipped to branch houses on the books and all other goods.

X Ques. 375. Where are those books?

Ans. At the works.

Complainant's counsel asks the defendants' counsel to produce such shipping books at the office of the examiner for examination, in obedience to the subpœna heretofore served, and defendants' counsel consents thereto.

Redirect examination.

By Mr. HAGAN:

Ques. 376. Would such shipping books on which the entries of grates shipped to branch houses were made show sales of grates?

Ans. No, sir, the shipping book was merely a memorandum of what goods were sent out of the foundry.

L. W. DRAKE.

SIMON F. MANN, sworn, being interrogated, did make answer as follows:

Examined by Mr. HAGAN:

Ques. 1. What is your name, residence and occupation?

Ans. My name is Simon F. Mann; residence Troy; age, 52; occupation, stove manufacturer.

Ques. 2. How long have you been engaged in the business of manufacturing stoves?

Ans. 40 years.

Ques. 3. During a portion of that time have you also been acquainted with the sale of stoves and their value on the market?

Ans. Yes, sir.

Ques. 4. Where are you at present engaged in that branch of the business?

138 Ans. Superintendent of the Co-operative stove works, Troy.

Ques. 5. Were you acquainted with the Stewart stove when it was upon the market?

Ans. Yes, sir.

Ques. 6. What was its reputation prior to 1869?

Ans. Its reputation stood pretty high.

Ques. 7. What do you know of its history since then?

Ans. Why, like many other stoves, its reputation diminished, and they ceased finding a market for it; stopped making them in consequence of finding no market.

Ques. 8. Do you know of any particular reason why it ceased to be a popular stove?

Ans. The only reason I know of is its being superseded by other stoves and better ones.

Ques. 9. Do you know anything of the Keep so-called improvements which were added to that stove in 1869 and 1870?

Ans. I do.

Ques. 10. In your opinion, what effect did they have upon the sale of the stoves?

Ans. Well, I think they increased the sale of it the year they were introduced, and killed it afterwards; that was my impression at the time, and is now.

Ques. 11. In answer to question 22 Mr. Keep states that the defendants have made and sold the flue plate described and claimed in said patent (patent No. 90756, dated June 1, 1869,) and as appearing in "Defendants' Ex. Bottom-oven Flue Plate and Stove Bottom of Stewart Cooking Stove of 1869 and 1873 Patent," and he further states, "This flue plate was put into the Stewart stove by the defendants, and sold with that stove and for that stove, and could have been applied as well to other cooking stoves." What is your opinion about that? Was it adapted to apply to other stoves?

139 Ans. Not as stoves were made; of course, you could make a stove to fit the flue plate, but stoves were not made that way.

By Mr. DAVENPORT:

Ques. 12. You mean by that, no stove that you knew of?

Ans. Yes, that I knew of; I never knew of any; I am speaking of stoves generally.

Ques. 13. It would not fit any stove you knew of?

Ans. No, sir.

By Mr. HAGAN:

Ques. 14. Mr. Keep says in answer to question 5, in relation to this flue plate: "In my judgment it increased the market value of the stove $1.50 per stove." What is your opinion about that?

Ans. I don't know as I understand that thoroughly; read it again.

Ques. 15. Do you think that flue plate increased its selling value?

Ans. I don't believe that it increased it at all.

Ques. 16. You think it was a benefit or an injury to the stove as applied?

Mr. DAVENPORT: I object to that.

Ques. 17. Whether its application was a detriment to the stove, as compared with the ordinary flue plate in use at the time?

Complainant's counsel objects as immaterial and incompetent. Objection sustained. Defendants except.

Ques. 18. The portion of this so-called "flue plate" was functional entirely, wasn't it; not ornamental in any way?

Ans. Oh, yes, certainly, it was functional; it wasn't ornamental; entirely out of sight.

Ques. 19. I repeat my former question?

140 Same objection, ruling and exception by defendants.

Ques. 20. In your judgment, do you think that the addition of that flue plate over ordinary flue plates in use at that time added $1.50 to the value of the stove?

Ans. I do not think it did.

Ques. 21. Did it add anything to the value of the stove?

Complainant's counsel objects, except it be limited to the selling or market value of the stove.

Defendants' counsel states that he limits it to the market value.

Mr. DAVENPORT: Then I don't object, as he has answered it now.

Ques. 22. Look at the ash pan now shown you and state whether, in your opinion, the swinging handle made in that ash pan would add to the selling value of that device over and above the use of the ordinary in-swinging bail in use in 1869?

Ans. An answer to that question could only be a man's judgment; of course there is no device of that kind, but what some one would like it and some one would object; I presume in the eyes of some it would add to its ualue; of course others would object to it; on the whole, it may have added something to the value; I should think it would for a year or two.

Ques. 23. Do you think it added 25 cents to the selling value of the ash pan?

Ans. A stove with that applied?

Ques. 24. No, to the ash pan?

Ans. I think 25 cents would be a liberal estimate of the value; I am considering the whole thing—the stove with that ash pan in it; of course in selling the ash pan you would sell the stove.

141 Ques. 25. Suppose you sold it as a "repair"—I ask you in reference to its being sold separate to the stove?

Ans. No, sir; I don't think we would ever sell any for "repairs;" I think after a man used one he wouldn't want another.

Ques. 26. Do you remember the addition made in 1869 to the Stewart stove of a raised hearth?

Ans. Yes, sir; it was an air chamber on top of the hearth.

Ques. 27. Do you think that added to the selling value of the stove?

Ans. I think it did for a time.

Ques. 28. Was it functionally an advantage to the stove?

Complainant's counsel objects as immaterial and incompetent. Objection sustained. Defendant- excepts.

Cross-examined by Mr. DAVENPORT:

X Ques. 29. Mr. Mann, have you ever sold any of the Stewart stoves?

Ans. No, sir.

X Ques. 30. Ever manufactured any?

Ans. No, sir.

X Ques. 31. What kind of cook stoves did you manufacture and sell since 1869?

Ans. We manufactured one called Gas Burner, the Superior, the Elegant, the New World.

X Ques. 32. Did you manufacture and sell a cooking range?

A. Yes, sir.

X Ques. 33. When did you begin the manufacture and sale of cooking ranges?

Ans. 1873, I think; I am not sure, but I think so.

X Ques. 34. When did the general demand for ranges take place; wasn't it in 1873?

142 Ans. The demand for ranges has existed largely since 1850; I worked two years for Charles Eddy wholly on range bottoms before I went in business for myself; previous to the war I worked for him.

X Ques. 35. Any increased demand for ranges at any time subsequent to that?

Ans. Yes, sir; there are more ranges used now than 15 years years ago, in proportion to cook stoves.

X Ques. 36. Has that demand for ranges been steadily increasing since 1859?

Ans. As far as our experience goes it has.

X Ques. 37. There was a greater demand for ranges in 1873 and thereafter than before?

Ans. Yes, sir.

X Ques. 38. Did not such increased demand for ranges decrease the manufacture and sale of ordinary cook stoves?

Ans. Yes, it certainly diminished it.

Redirect examination.

By Mr. HAGAN:

Ques. 39. Was there any sudden increase in the sale of ranges between 1869 and 1873?

Ans. I don't know exactly what you mean by "sudden;" an extensive dropping off in cook stoves and replacing the trade by ranges in one season.

Ques. 40. Yes, that I would call "sudden."

Ans. No, sir; the difference has been going steadily on; I am speaking from our experience and our trade and the difference in the proportion manufactured of stoves and ranges continues to get greater; that is, up to the present day with us.

Ques. 41. Are there any of the cook stoves which you made and had on the market in 1869 and 1870 made and sold by you now?

Ans. Yes, sir.

Ques. 42. Have they maintained their average sale since that?

143 Ans. No, sir.

Ques. 43. You have had one stove that has sold right along and there has been no great decrease in it, has there?

Ans. The Gas Burner.

Ques. 44. Yes, that has kept along about the same.

Ans. No, we have not made any since a year ago this spring; we made and filled a small order for it then; that stove run 18 years; we have diminished cook stoves during the past five years and replaced them with ranges more than we did five years previous; it is only recently, I will say 10 years, that the farmers and small country villages have got to using ranges to any extent; the cities used them before.

Recross examination.

By Mr. DAVENPORT:

X Ques. 45. How long before that?

Ans. As long as I can remember; I worked in a shop in New York in 1850 that run almost exclusively on the Beebe range; that is 35 years ago; we don't go to New York to sell cook stoves now at all.

X Ques. 46. When you stated that you didn't believe that the flue plates increased the selling value of the Stewart stove did you base your judgment upon the flue plate itself and from your knowledge of its operation?

Ans. Yes, sir.

Further hearing adjourned to July 29th and 30th, 1885.

144 TROY, N. Y., *Dec.* 3, 1885.

The parties met at 10 a. m. Present as before.

Defendants' counsel offers in evidence certified copy of letters patent to William E. Bleecker, dated March 27th, 1849, number 6222, for improvement in cooking stoves.

Complainant's counsel objects as immaterial and incompetent, inasmuch as said letters patent can be offered for no other purpose than to show an anticipation of the complainant's patents, in order to defeat such patents, and it is improper at this stage of the proceedings.

Defendants offer this patent in evidence for the purpose, not for attacking the question of infringement-, which have been admitted, of certain patents in suit, but for the purpose of showing the extent of the improvement made by Mr. Keep, and its value, and to what extent he had improved upon the prior state of the art.

Complainant insists that such letters patent are not competent for that or any other purpose, and therefore objects to its introduction.

Complainant excepts.

Defendants' counsel offers in evidence certified copy of letters patent granted to Wm. E. Bleecker, dated September 18th, 1849, number 6718, for improvements in flues for cooking stoves. Offered for same purposes as stated in regard to the last exhibit.

Same objection as before. Objection overruled. Exception by complainant.

Same marked respectively, "Defendants' Exhibit Bleecker's Patent, September 18th, 1849, K.," and "Defendants' Exhibit Bleecker's Patent, March 27th, 1849, K."

145 WALTER P. WARREN resumed.

By Mr. HAGAN:

Ques. 62. Mr. Warren, did the defendants in this case ever pay any royalties to anybody upon the Stewart stoves manufactured by them subsequent to February 1st, 1878?

Objected to as immaterial and incompetent.

The defendants offer this evidence to show that since February 1st, 1878, they have paid royalties upon such of the Stewart stoves as they have made, and containing the Keep inventions, upon which this decree for infringement is made.

Complainant's counsel consents to the proof of such payment at any time subsequent to the entry of the decree in this case.

The MASTER: It seems to me I cannot go beyond that decree. That decree tells what shall be done at this reference.

Exception.

Ques. 63. Mr. Keep was an employee of Mrs. Stewart, was he not?

Ans. He was.

Ques. 64. And under your agreement you were to pay Mrs. Stewart for the use of the Keep patents?

Objected to as incompetent, as that agreement speaks for itself, and the evidence would be secondary. Same ruling and exception as before.

Ques. 65. I see, on examining Mr. Keep's account, that he estimates on January 1st, 1876, that the first cost of making No. 4½ grates at 48 cents, on May 15th, 1878, he again estimates the manufacture of the same grate at 48 cents; in your opinion, are those cost prices correct?

Ans. They are not correct.

146 Ques. 66. I read from that memorandum that the cost of No. 1 pig-iron January 1st, 1876, is about $23.21 per ton delivered in your yard; is that correct?

Ans. That is correct.

Ques. 67. What was the cost of the same iron on May 15th, 1876?

Ans. About $18.

Ques. 68. What was the price of general moulding January, 1876?

Objected to.

Ques. 69. Of moulding grates in 1876 per ton?

Objected to as an improper manner of proving cost.

REFEREE: Do you limit it to his shop?

Mr. HAGAN: Yes, what they paid. It is their profit on this thing you are after.

Objection overruled. Exception.

Ans. $30.40 per ton.

Ques. 70. What was the price of moulding stove grates May 15th, 1878?

Ans. $18.30 per ton.

Ques. 71. Now, with iron at 22⅜ per cent. and moulding at 39⅘ per cent. less in 1878 than it was in 1876, do I understand you to say that Mr. Keep calls the first, or foundry, price of the number 4½ grate the same for 1876 that he does in 1878?

Ans. Yes, 48 cents.

Ques. 72. What does he estimate the first cost of the same grate in 1882?

Objected to as incompetent. Mr. Keep's testimony speaks for itself. Question not pressed.

Ques. 73. Mr. Keep, as I understand, in his testimony as to the cost of these grates which he claims you made and sold, has
147 a generally uniform price as to their cost between February 1st, 1878, and January 1st, 1882?

Ans. He has.

Before answer complainant's counsel object that the question assumes a fact which does not appear from Mr. Keep's testimony. Objection overruled. Exception.

Ques. 74. During the period named in the last question (that is, between February 1st, 1878, and January 1st, 1882,) there were great fluctuations in the price of iron and in the price of moulding, were there not, including grates?

Ans. There were; very great.

Ques. 75. Would the uniform price for the grates made and sold by you during that time be a correct one in enabling the master to determine the question of profits in view of these facts?

Ans. They would be very incorrect.

It is understood the objections are to appear before the answer whenever witness answers before ruling.

Last question objected to as incompetent, improper and immaterial. Objection overruled. Exception.

Ques. 76. Assuming that a number 4½, Stewart or Keep grate, weighed 13¾ pounds, and cost 48 cents, and you sell it for $1.50, on what would the profit between the cost and the selling price of that grate be based?

Objected to as immaterial, incompetent, and not the proper way of proving profits; and it is immaterial because the question answers itself, as it shows the cost of the article and the price at which they sold it, and any legal construction which the witness may desire to give to the question is incompetent. Objection overruled. Exception by complain-t.

148 Ans. It would be based on the construction of the grate, and the materials used therein; for instance, the profit of the moulding, mounting, the iron, profit on interest, on capital used, &c., &c.

Ques. 77. Would any of that profit be due to the alleged Keep invention in grates?

Objected to as incompetent, immaterial and inadmissible. Objection sustained. Exception by defendants.

Ques. 78. You sold other grates to fit these Stewart stoves, did you not, than the Keep grate?

Ans. We did.

Ques. 79. Did you get any greater price for the Keep grates sold to fit the Stewart stoves than you did for any other grates to fit those stoves?

Objected to. Objection sustained. Exception by defendants.

Ques. 80. Did you sell the Keep grates for any greater price than you did the Stewart grate for the Stewart stoves?

Objection as above. Same ruling and exception.

Ques. 81. When did Mr. Keep notify you, if you remember, to stop using these inventions? Did Mr. Keep at any time, prior to January 30th, 1877, notify you, or either of the other defendants, that you must desist from using his inventions?

Ans. Not officially; I don't know anything about it; I don't remember what he said in conversation; he never did me.

Ques. 82. When did you first receive word, in writing from Mr. Keep, that you must stop using those inventions?

Ans. January 30th, 1877; that is the first notice we ever had from him in a business-like way that I know of.

149 Ques. 83. These Keep grates themselves, which you sold, in themselves were no detriment to Stewart stoves, were they?

Objected to. (Question withdrawn.)

Ques. 84. Why did you continue to use these inventions after you had received notice in writing from Mr. Keep to desist?

Objected to. Objection overruled. Exception.

Mr. HAGAN: I want to offer it in extenuation of this action. I offer it to show the moral effect of the infringement.

Objected to as immaterial, incompetent and inadmissible. Objection overruled. Exception.

Ans. Well, we did stop making them entirely for any new stoves; we stopped entirely making them for new stoves, but we continued to make them for old stoves under our contract with Mrs. Stewart.

By Mr. DAVENPORT:

Ques. 85. What time was that?

Ans. That was after January 30th, 1877, we continued to make

them under our contract with Mrs. Stewart; we made them for repairs and for old stoves.

Ques. 86. When did that contract expire?

Ans. 1882.

By Mr. HAGAN:

Ques. 87. Down to what time did you continue?

Ans. We continued to make these grates for repairs for stoves, under the advice of counsel, and under our agreement we never doubted the right to supply old stoves with grates.

Recess to 2 p. m.

150 WALTER P. WARREN continued.

By Mr. HAGAN:

Ques. 88. Mr. Warren, did you have any uniform price at which you sold the so-called Keep grates and the Stewart grates?

Ans. Yes, sir; we had a uniform price.

Ques. 89. Did that price vary at all in different years and at different times?

Ans. Yes.

Ques. 90. You may state, if you know, at what price for?

Ans. I can tell *my* referring to my papers.

Ques. 91. See if you can tell by referring?

Ans. I can tell by referring to this paper at any particular time.

Ques. 92. You say they vary?

Ans. Different prices in different years.

Ques. 93. Say from January 1st, 1876, to January 1st, 1877, what was the selling price of number 3½ grate?

Ans. $1.25.

Ques. 94. That was the "Keep grate" applied to the Stewart stove?

Ans. It was.

Ques. 95. What did you sell the Stewart grate for, for the same stove, at the same time?

Objected to as immaterial.

Mr. HAGAN: We offer it for the purpose of showing the measure of value which the "Keep improvement" added to the grate over the ordinary grate they could have used at that time.

Complainant objects as above, and on the further ground that the decree in this case calls for an accounting of profits upon
151 these grates, and that the grate is an entirety, and that the patent is upon the grate as a whole.

Objection sustained. Defendants except.

Ques. 96. When grates were ordered for the Stewart stove what kind of grates did you furnish?

Ans. We furnished the Stewart grates; we called them both Stewart grates; one was the Keep pattern and the other was the Stewart pattern.

Ques. 97. Either would fit the same stove?

Ans. Yes, sir.

Ques. 98. Either of them was made for the same stove?

Ans. Yes, they would interchange.

Ques. 99. Did the improvement in the Keep grate, as you made and sold it, add anything in its selling value over the Stewart grate, which you say could be applied to the same stove?

Objection as before, and not the proper mode of proving profits. Same ruling and exception.

Ques. 100. Do you know of any book in the possession of the defendants from which could be determined the exact cost of the so-called "Keep grate" between February 1st, 1878, and January 1st, 1882?

Ans. No, sir; we had no books at that time which would prove conclusively the cost of our manufacturing.

Ques. 101. Do you know of the existence of a book at any time during the interim stated in the last question compiled by Mr. Hazard in which the cost of the so-called grates, as made by you, was correctly stated?

Ans. No, sir.

Ques. 102. Assuming that Mr. Keep's statement as to the cost of the grates made and sold by you, as between February 1st, 1878, and January 2d, 1882, was correct as to the cost of iron and
152 moulding, did his estimate of cost take into account interest on capital, insurance, and the cost of marketing and selling the goods?

Ans. No; assuming his cost to be correct it could not have done so.

Cross-examination by Mr. DAVENPORT:

X Ques. 1. When did Mr. Keep leave your employ?

Ans. He left our employ about December 31st, 1875.

X Ques. 2. He has never been in your employ since?

Ans. No.

X Ques. 3. How long have you made and sold the so-called Stewart stoves?

Ans. I have back here as late as 1855; I have it all here in detail, if I can refer to it; no, we commenced farther back than that; 1853 was when we first commenced to make the Stewart stove.

X Ques. 4. That was Fuller, Warren & Co., and their predecessors?

Ans. It may be Fuller, Warren & Co., but the first manufacturing the Stewart stove with Mr. Stewart was in 1853.

X Ques. 5. When did you discontinue the manufacture and sale of the Stewart stove?

Ans. We practically stopped manufacturing the Stewart stove in 1877.

X Ques. 6. What do you mean by "practically"?

Ans. There were few stoves made after that; from that time to date we have only made about 500 and odd Stewart stoves.

X Ques. 7. You have substituted some other and modern stoves?

Ans. We substituted other stoves for them.

X Ques. 8. From 1869 to the year 1877, and after the intro-
153 duction of the Keep improvements so called (which was that year 1869), did you continue the so-called Keep improvements up to 1877?

Objected to that it assumes that the "Keep improvements" were added in 1878, which was not the fact.

X Ques. 9. Was there any material change?

Ans. There was a constant change in that stove; adding to the stove all the time something; the "Keep improvements" were added at different times, between the years 1869 and 1875.

X Ques. 10. And since the year 1877 have the Keep inventions involved in this suit been continued in the same Stewart stoves?

Ans. We haven't made any of any consequence since 1877.

X Ques. 11. Have they been continued in the Stewart stoves that you have made and sold?

Ans. In the few that we have made and sold they were.

X Ques. 12. Can you say how many of the Stewart stoves were sold in the year 1869?

Ans. Yes, sir, 2,333.

X Ques. 13. The Stewart stoves which you made prior to 1870, you discontinued the manufacture of such stoves thereafter, did you?

Ans. It seems to me I have just answered that question, didn't I. I said we practically stopped making such stoves in 1877; it is impossible for me to tell you, sir; some of them are used today, but it is very probable we must have made some, because there was a demand for the old Stewart stoves aside from Mr. Keep's improvements.

X Ques. 14. Was it a part of your special business to attend to the sales of stoves specially; did you specially attend to the sales?

Ans. When?

X Ques. 15. During the time you have spoken of, from 1869 to 1878?

154 Ans. I was not in the firm until 1871.

X Ques. 16. In the year 1871 was it your special business to attend to the sales of stoves?

Ans. No; it was not my "special business;" my department covered the whole business.

X Ques. 17. When did you first make a stove to supersede the Stewart stove?

Ans. Well, I don't remember we have made one to supersede the Stewart stove; it is a long way back, Mr. Davenport; I suppose we were making stoves all the time.

X Ques. 18. What other cook stoves did you make in the year 1869 than the Stewart cook?

Ans. You mean we manufactured?

X Ques. 19. Yes, sir.

Ans. I wasn't in the business.

X Ques. 20. You don't know, then.

Ans. I suppose I could inform myself; I don't know of my knowledge.

X Ques. 21. Did you make a stove called "The Golden Crown," or "Home Friend"?

Ans. The "Golden Crown"—I think that is the name of it.

X Ques. 22. When did you put that stove upon the market?

Ans. I don't remember.

X Ques. 23. It was subsequent to 1870, was it not?

Ans. No, sir; I think the same stove was made by another name; called the "Home Friend;" it was changed afterwards to "Golden Crown;" I think the "Home Friend" was being manufactured by Fuller, Warren & Co. when I went there in 1871, at the same time the Stewart stove was.

X Ques. 24. When was its name changed to "Golden Crown"?

Ans. I could not tell you.

X Ques. 25. After 1871, was it?

Ans. Yes, sir.

155 X Ques. 26. Do you remember that there was a panic in 1873?

Ans. Yes, sir.

X Ques. 27. Did that affect the sale of stoves at all?

Ans. No, sir; I think we did a better business in 1873 than for several years previous.

X Ques. 28. You don't think it affected your business at all?

Ans. I know it didn't.

X Ques. 29. When did you first begin to make a range?

Ans. A range was made when I went there; ranges had been made for many years previous to my coming there.

X Ques. 30. What was it called?

Ans. I don't remember.

X Ques. 31. Did you get up a new range at any time?

Ans. We were always getting up new goods; there wasn't a year passed but what we were getting up new goods; it is impossible to say.

X Ques. 32. Did you after 1870 get up a new range?

Ans. I think every year; we were getting them up constantly.

X Ques. 33. How many kinds of ranges were manufactured by you — 1870 or 1871, which would take the place of cook stoves?

Ans. There were none made then to take the place of first-class cook stoves that I remember of.

X Ques. 34. When did you first make one which would take the place of the first-class cook stove?

Ans. It must have been along in 1870—we were making all the time that we are speaking of—we were making a first-class range, and we were making one when I came with the company *of* 1871.

X Ques. 35. Which would answer the purpose of a first-class cook stove?

156 Ans. Yes, sir.

X Ques. 36. Now, did you make a range in 1870—a new range—to take the place of first-class cook stoves?

Ans. I don't remember.

X Ques. 37. Did you in 1871 or 1872?

Ans. We made one in either 1871 or 1872 but not to take the place of first-class cook stoves; cheap range.

X Ques. 38. Which wouldn't take the place of first-class cook stoves?

Ans. No, sir.

X Ques. 39. Did you ever make a range to take the place of first-class cook stoves?

Ans. Yes, sir.

X Ques. 40. When was that first made?

Ans. I don't remember.

X Ques. 41. Give the date as nearly as you can?

Ans. I cannot give it.

X Ques. 42. Are you still making such ranges—which will take the place of first-class cook stoves?

Ans. Yes, sir.

X Ques. 43. Has the manufacture and sale of such ranges had any effect upon the manufacture and sale of cook stoves?

Ans. Yes, sir.

X Ques. 44. What effect?

Ans. Well, there are less cook stoves made and more ranges.

X Ques. 45. Can you state how many ranges which take the place of first-class cook stoves, you made and sold in the year 1871?

Ans. I cannot.

X Ques. 46. Can you approximate it?

Ans. I cannot.

X Ques. 47. In order to avoid the question as to what is meant by first-class cook stoves, I will ask you when you first made a range which would take the place of the Stewart cook stove.

157 Objected to as immaterial. Objection overruled. Defendants except.

Ans. It is answered by my previous answer by saying when I came with Fuller, Warren & Co., they were making a first-class range, and had been making it.

X Ques. 48. And that was in the year 1871?

Ans. Yes, sir; they were made several years previous to that.

X Ques. 49. And that range would take the place of the Stewart cook?

A. It depends upon the customer to a great extent.

X Ques. 50. Subsequent to 1871, when did you produce the next range which would take the place of the Stewart cook, if any?

Ans. During all these years we were making so many new cooks and ranges that it is impossible for me to answer accurately.

X Ques. 51. Then since the year 1871 you have been constantly making improvements in such ranges? Is that the idea?

Ans. We have been constantly making improvement in all our goods.

X Ques. 52. Ranges and stoves?

Ans. Stoves and ranges.

X Ques. 53. I ask you if you were in ranges?

Ans. Yes; that covers both, I suppose.

X Ques. 54. Has the manufacture and sale of ranges steadily increased since the year 1871?

Ans. Not increased in our business in any greater proportion than the manufacture of stoves. I doubt if it equals the manufacture of stoves.

X Ques. 55. How many cook stoves did you make and sell in the year 1883?

Ans. I object to answering such questions unless it is "Stewart stoves."

158 Question objected to. January, 1882, is the limit of this inquiry.

X Ques. 56. I change it to the year 1880?

Ans. We made 207 Stewart cook stoves containing the "Keep improvements."

X Ques. 57. My question is how many cook stoves you made in the year 1880?

Ans. I don't think I am called upon to make an answer.

Objected to as beyond the limit of this inquiry. They are not bound to disclose their whole business, and the profits of their whole business, and as immaterial.

Objection overruled. Exception.

Ans. I do not know.

X Ques. 58. Can you say for the year 1882?

Ans. I cannot.

X Ques. 59. Can you say for any year prior to 1880?

Ans. I cannot, except "Stewart stoves."

X Ques. 60. Have you books which will show the number of cook stoves you made between the years 1869 and 1873?

Ans. We have not.

X Ques. 61. And you have no means of ascertaining—no means of knowing?

Ans. Except in the latter part of the years. Very possibly we could ascertain from 1875.

X Ques. 62. Can you now state how many cook stoves you made in the year 1874?

Ans. I cannot.

X Ques. 63. You have books which will show the number of cook stoves you made in 1874?

Ans. I am not exactly certain of 1874. I think perhaps in 1875.

— Ques. 64. Will you produce such books to the master?

159 Mr. HAGAN: I object; that is going into their private business. It is a matter entirely of proof, they can get in other ways.

Objection overruled. Exception.

X Ques. 65. I now ask him to produce a statement, which he may take from the books themselves of the number of stoves made in 1875.

Objected to as immaterial. Objection overruled. Exception.

X Ques. 66. Did they make any stove to take the place of the Stewart cook stove?

Ans. I cannot state; I don't know; I could give you an approximation, or idea.

X Ques. 67. Have you any means of ascertaining the number of such ranges made in any one year since 1871, and if so, what years?

Objected to as before. Objection overruled. Exception.

Ans. It would depend very much on what you called a stove to supersede the Stewart cook; define the question.

X Ques. 68. I have said nothing about a range to supersede a Stewart cook, or any other cook; I asked if you could state (if you had any means of knowing) how many ranges, which would take the place of a stove like the Stewart cook, were made and sold any year since 1871, and if so, what years?

Ans. I don't know; I have the means of finding out how many ranges were made, but I don't know whether they would supersede the Stewart cook.

X Ques. 69. I haven't asked you to give me any information as to ranges which superseded the Stewart cook, or which were made to supersede the Stewart cook; my question relates to ranges
160 made which would take the place, not supersede, but which would take the place of a stove like the Stewart cook?

Ans. I have no means of telling.

X Ques. 70. And you have no books with you to show?

Ans. Not to show such a thing as that; no, not as I understand the question.

X Ques. 71. How many of the Stewart stoves such as were made prior to 1869, and before any of the inventions of Mr. Keep were introduced in such stoves, were sold in the year 1871?

Ans. I have no means of telling.

X Ques. 72. Can you say how many of such stoves were sold for any year subsequent to year 1871?

Objection as above. Overruled. Exception.

Ans. I don't know.

X Ques. 73. After the year 1869 did you make any of the Stewart stoves which did not embrace the Keep patterns in controversy?

Ans. I couldn't say; you asked me that question awhile ago.

X Ques. 74. You made such stoves in 1869?

Ans. We did, very probably.

X Ques. 75. But you cannot say whether you continued the manufacture of such stoves after 1869?

Ans. Very probably we did; there was a call for the old stove.

X Ques. 76. And can you state how long you continued to make them?

Ans. I cannot.

X Ques. 77. If you haven't stated, will you please state when you

ceased, if at all, to manufacture any of the stoves called the "Stewart stoves," embracing any of the Keep inventions spoken of?

Objected to as answered two or three times.

161 Ans. I said we practically stopped making them in 1877, and we only made a very few after that; during 1877 we only made 109 Stewart stoves; from that time to date we have only manufactured about 546 more, corresponding to your figures.

The MASTER: That is the cook stove?

The WITNESS: Yes, sir.

X Ques. 78. In answer to direct question 27 you stated that you had some of the Stewart stoves sent back on account of the alleged improvements of Mr. Keep, and had a great many—please state in what year or years those stoves were returned?

Ans. I cannot without referring to data that we have at the works—at the office.

X Ques. 79. I would like that information, if you can obtain it, as you say you can, for some subsequent hearing.

Ans. I can and will do so.

X Ques. 80. You also stated that they returned them on account of the alleged improvements of Mr. Keep, do you think that was the sole reason?

Ans. Yes, sir; they were returned because of Mr. Keep's improvements.

X Ques. 81. I ask if that is the sole reason?

Ans. I don't say that is the sole reason.

X Ques. 82. By whom were they returned, by customers or by your agents?

Ans. Both.

X Ques. 83. Did the customers state the reason for returning the stoves?

Ans. They did in many cases.

X Ques. 84. Personally or by letter?

Ans. I cannot say in regard to that; probably in both ways; they said they wouldn't burn coal and they had to send them back.

X Ques. 85. What reasons did the customers give?

Ans. They gave various reasons.

162 X Ques. 86. Name them.

Ans. The stoves were inoperative.

X Ques. 87. What else?

Ans. I couldn't say without consulting the records or talking with our agents.

X Ques. 88. Can you state in that connection in what year you had any such statements made?

Ans. No, sir.

X Ques. 89. Were these stoves returned coal or wood stoves?

Ans. Coal stoves.

X Ques. 90. All coal stoves?

Ans. I don't know that they were all coal stoves.

X Ques. 91. When these stoves were returned did you supply their places with any other stove, if so, what stove?

Ans. It is so long since I can't answer.

X Ques. 92. In the case of complaints by agents or branch houses, did you supply the place of those returned stoves with other stoves, and if so, what stoves?

Ans. I am unable to say.

X Ques. 93. At the time, and before the return of these Stewart stoves you have spoken of, you were making several kinds of cook stoves were you not, and if so, how many kinds?

Ans. We have always made several kinds of cook stoves; we were making several kinds of cook stoves at this time; cannot say how many.

X Ques. 94. Can you say how many different kinds of cook stoves?

Ans. I cannot say definitely.

X Ques. 95. Did you, where any stoves were returned containing the improvements of Mr. Keep, supply their places with the Stewart stove of 1869?

Ans. I couldn't say.

X Ques. 96. As I understand, the Stewart stove of 1859, so called, did not contain any of the Keep improvements?

163 Ans. I don't know exactly as to that; the changes were made in 1869; we commenced to make those improvements, you know; we sold some in 1869; I suppose we did; I cannot say; in 1869 we began to use them; whether they came in late that year and sold next year I cannot tell.

X Ques. 97. I mean to ask you if you supplied the place of any of the stoves returned by customers or agents, and containing the Keep inventions to which you referred in question 27, by the Stewart stove made and sold by you prior to 1869, and which contained none of the alleged inventions of Mr. Keep?

Ans. I could not say.

Further hearing adjourned to Friday, December 4, 1885, 2 p. m.

TROY, N. Y., *Dec.* 4, 1885—2 p. m.

WALTER P. WARREN, resumed upon the cross-examination.

Examined by Mr. DAVENPORT:

X Ques. 98. Before the adjournment, in your partial answer to your direct answer to question 27, you stated that you could tell by an examination of your books when the stoves referred to in that answer were returned; if you have now examined those books you may state at what time those stoves were returned?

Ans. They commence May 19th, 1871, and extend down to June 23, 1883.

X Ques. 99. You said there were a great many sent back?

Ans. Yes, sir.

X Ques. 100. Now you say they were returned, commencing at the dates named?

Ans. Yes, sir.

164 Defendants' counsel states that he desires the account in.

The WITNESS: I mean to show where they came from, and the dates on which they were returned, and the size and kind that were returned. We want to show that these stoves would not sell and were returned from all over the world.

Complainant's counsel states that he will take that statement of how many were returned each year.

X Ques. 101. Give the numbers and dates for each year, if you please?

Ans. I can't foot these all up here; they are all drawn off singly for each year they were returned; from May 19th, 1871, to November 10th, 1881, there were 668 stoves returned.

X Ques. 102. And those were the Stewart stoves, containing the Keep inventions, all of them?

Ans. Yes, sir.

X Ques. 103. Now, can you tell me from that statement how many were returned in the first year?

Ans. I have got to add them up to find out; I can call them off, and you can add them up; it is 19.

X Ques. 104. In 1872?

Ans. 166.

X Ques. 105. In 1873?

Ans. 94.

X Ques. 106. In 1874?

Ans. 74.

X Ques. 107. In 1875?

Ans. 52.

X Ques. 108. And the balance are spread through the remaining years?

Ans. They must have been.

X Ques. 109. Now, what became of those stoves after they were returned?

165 Ans. They were sold, I suppose, or worked off in some way.

X Ques. 110. Sold to other parties?

Ans. The majority of them, I suppose.

X Ques. 111. What became of the minority of them?

Ans. They might have been broken up.

X Ques. 112. Why would they have been broken up?

Ans. Because they would not sell.

X Ques. 113. You said you sold 3,054 of them in 1871; they were the same kind of stoves, weren't they?

Ans. I can't say they were all the same stoves, or whether some of them were made before 1869 or not.

X Ques. 114. Of the 166 returned in 1872 do you think any of those were broken up?

Ans. I couldn't say.

X Ques. 115. Why do you say any of them were broken up when you continued to sell the same kind of stove at the rate of 2,000 or 3,000 a year?

Ans. I don't say they were broken up immediately; they might have been carried along for several years.

X Ques. 116. Do you know that any of them were broken up?

Ans. Yes, sir; I ordered some of them broken up myself, and I know they were.

X Ques. 117. When was that?

Ans. I can't say what year; probably in the later years.

X Ques. 118. What do you mean—after 1875 or before.

Ans. Oh, I don't know, sir; I couldn't say.

X Ques. 119. Must there have been some reason for their having been broken up, while at the same time you were breaking up these stoves, as you state, you were selling the same kind?

166 Ans. Oh, they probably were broken up in the later years, I tell you; when the sale ceased, and we couldn't do anything with them.

X Ques. 120. After the sale of the stoves ceased they must have been broken up?

Ans. Yes, probably; we wouldn't break up anything we could possibly sell, we would not until after the demand and sale ceased.

(Mr. HAGAN:)

Ques. Some of the stoves that had been returned, you could not do anything with them?

Ans. Well, we tried at times to repair them and sell them again, but they kept coming back, and after a while we would get disgusted and throw them on the scrap heap.

X Ques. 121. But that was subsequently to the time that the sale was discontioned?

Ans. Yes, sir; it was after the sale was discontinued.

X Ques. 122. Please look at "Defendants' Exhibit Circular" and state how many of the cuts in that circular represent the Keep grate.

Ans. I should say four of them.

X Ques. 123. The one on the third page and two on the fourth page?

Ans. I should say two on the third page and two on the fourth page.

X Ques. 124. Can you tell when tnat circular was issued?

Ans. I don't know.

X Ques. 125. It was issued after 1878, wasn't it?

A. I don't know anything about it.

X Ques. 126. You can tell by the date, can't you?

Ans. I tell you I can't tell.

X Ques. 127 (presenting same). Look at the bottom line upon that page?

Ans. I couldn't tell by that when it was.

X Ques. 128. That would not refer to the future but to the past, so it must have been issued after 1878?

167 Ans. I don't know when it was issued; it might have been issued last week as far as that date is concerned.

X Ques. 129. Wasn't it issued subsequently to the year 1878?

Ans. I don't know when it was issued.

X Ques. 130. Do you not find on page three of that circular a statement in relation to grates as follows: "to fit stoves from 1873 to 1878," and the same statement on page four; is that the fact?

Ans. You say so; the statement says, "to fit stoves from 1873 to 1878" in one place, and on the last page "to fit stoves from 1873 to 1878;" it does say so.

X Ques. 131. In view of those statements can you not say whether that circular was issued prior or subsequent to 1878?

Ans. I don't know when it was issued.

X Ques. 132. On the first page of that circular there are two cuts of stoves of the 1838 pattern; on the second page of that circular, as you will see, there are two cuts of stoves, of the '59 pattern and one of the '67 pattern; I want to know if any of the stoves that are there represented contain any of the Keep inventions?

Ans. I am not familiar with the stoves at that period.

X Ques. 133. You don't know?

Ans. No, sir.

X Ques. 134. On the third page is a cut of the stove called "Stewart's 1869 pattern"—what stove was that?

Ans. Stove made in 1869, I presume; I was not in the business at that time.

X Ques. 135. You are familiar with that stove, are you not?

Ans. I am familiar with that stove to a certain extent.

168 X Ques. 136. Does that embrace the Keep inventions or not?

Ans. I presume that it contained a part of it.

X Ques. 137. The one on the fourth page, called "the close-front iron case," did that contain the Keep inventions?

Ans. It did.

X Ques. 138. Was that stove made subsequent to the 1869 stove?

Ans. Made after the 1869 stove.

X Ques. 139. Is that the stove having the Keep design patent?

Ans. Yes, on the oven door.

X Ques. 140. When did you cease to manufacture that stove?

Ans. That all was in that last year.

X Ques. 141. Not as to the design patent?

Ans. The one we talked about last night, and which I answered two or three times in regard to, when we stopped manufacturing that stove.

X Ques. 142. I didn't understand you referred to the stove of 1869?

Ans. The only stove we made in those times; I told you, with the exception of the first two or three years, we perhaps have made some of the old stoves in 1871 or 1870, and I couldn't answer conclusively as regards that, but that (indicating) is the stove that we made after those days; that is called the '73 pattern; it incorporates all his improvements, and that is the stove we made—design and all—flue plate and raised doors and everything; I said we stopped making that practically in 1877.

X Ques. 143. And how long after that did you continue to manufacture and use the grates known as the Keep grate?

Ans. After we received Mr. Keep's notice we were expected to pay a royalty on his grates we stopped manufacturing them for new stoves.

169 X Ques. 144. That does not answer my question; my question is, when, after that, did you cease to manufacture and sell the so-called Keep grates?

Ans. I say that we stopped making them, practically, for new stoves at that time (in 1877), and we continued to manufacture them for repairs——

X Ques. 145. (Interrupting.) I don't want that answer; my question is, after that time when did you cease to manufacture and sell the grate known as the Keep grate, and called in that circular the Keep grate?

Ans. We stopped manufacturing for those stoves in 1877, and stopped manufacturing them for repairs January, 1881.

Complainant's counsel objects to the answer, and moves to strike it out, and defendants' counsel insists that it shall stand, and that witness is entitled to make the explanation.

The MASTER: The question calls for the time when he ceased to manufacture the grate.

The WITNESS: About January 1, 1881.

The MASTER: Strike out the other now.

Defendants' counsel objects to the ruling.

X Ques. 146. Have any of those grates been manufactured and sold to your knowledge by any concern with which you are connected since about January, 1881?

Ans. No.

X Ques. 147. You don't make them now?

Ans. No, we do not.

X Ques. 148. Did the manufacture and sale of the 1869 stove, so called, and the one you have called the 1873 stove, go on together to some exten-?

Ans. My best recollection is as soon as we commenced to
170 make the 1873 the 1869 stove was discontinued, practically discontinued; that must be qualified; there might have been customers who would send for a stove back of 1869, wanting them, and we may have made more or less; it is a pretty hard question to pin a man down to an exact time.

X Ques. 149. In answer to direct question- 56 and 57, you say that the design described in the design patent in question did not increase the value of the stove over others in the market of the same character, and in answer to question 58 you say that you are not able to sell it for 25 cents more than you would with any designs that were in use at that time.

Ans. (The witness read over the questions and answers alluded to, and at this point Mr. Cowen appeared in the case and an adjournment was taken pending the answer to the question.)

Further hearing adjourned to December 18, 1885, at 10 a. m.

TROY, N. Y., *Dec.* 18, 1885—10 a. m.

The parties met agreeable to adjournment.

Present as before, and Mr. Esek Cowen appears for the defendants.

WALTER P. WARREN, being resumed upon the cross-examination by Mr. DAVENPORT, testified as follows:

X Ques. 150. You have stated on your direct examination that the flue plate, raised hearths and doors, ash pan, and the other inventions of Mr. Keep in question, did not increase the selling value of the stoves; will you state how you know such fact?

Ans. Because the stove didn't sell for any more after they were incorporated than it did before.

171 X Ques. 151. You mean by that you asked no greater price for them?

A. Yes, sir.

X Ques. 152. That is, you put them on the market at the same price you did before?

Ans. Yes, sir.

X Ques. 153. You also state in answer to direct question 40 that the flue plates put in the stoves rapidly decreased the market value of the stoves; state what you mean by that answer?

Ans. I mean the public would not buy them because they would not work well.

(Mr. COWEN:)

Ques. You mean it decreased the sale?

Ans. Yes, sir.

X Ques. 154. When did you discontinue putting that flue plate in the stoves?

Ans. We didn't discontinue it in the Stewart stove.

X Ques. 155. If it decreased the sale of the stoves why did you not remove it?

Ans. The stove was manufactured for Mrs. Stewart under Mr. Keep's direction; we had nothing to say about it.

X Ques. 156. That flue plate was not in the Stewart stove manufactured prior to the '69 stove, was it?

Ans. No, sir; not to my recollection.

X Ques. 157. If these improvements tended to decrease the sale of the stoves, why did you not continue the sale of the Stewart stove which did not contain the improvements?

Ans. I said before we were under contract, and we had to manufacture the stove according to Mr. Keep's direction.

X Ques. 158. Were you prevented in any way from making the older Stewart stove?

Ans. Mr. Keep was the inventor and had charge of the stove, and we made them exactly as he directed us to do.

172 X Ques. 159. Were you prevented in any way from making the older Stewart stove?

Ans. I understand after we introduced the Keep improvements

in 1869 we were not at liberty, under our contract with Mrs. Stewart, to make the older stove.

X Ques. 160. But you did continue to make the older stoves, did you not, and have so stated?

Ans. We may have done so to a limited extent.

X Ques. 161. Then do I understand you as saying that you had no right to make any stove except such as Mr. Keep directed?

Ans. That is what I mean to say.

X Ques. 162. Did he ever direct you to make no other stove except this one containing his improvements?

Ans. Mr. Keep furnished us the patterns from which to make the stove, and we made them according to his directions.

X Ques. 163. Did he ever direct you to make no other stove except this one containing his improvements?

Ans. He didn't tell me in so many words not to make any other stove, to my recollection.

X Ques. 164. Do you mean to say that you did make no stoves except such as Mr. Keep directed?

Ans. Practically we did not.

X Ques. 165. What do you mean by "practically we did not"?

Ans. I mean to say that, perhaps, if a customer had had an order for a few of the old pattern stove when we commenced to make the new ones, and desired the old ones, we possibly might have made some; practically, we didn't make the old stoves after the new ones were introduced.

X Ques. 166. When was the cook stove known and sold as the "Golden Crown" first made?

Ans. I don't know how early.

X Ques. 167. Was it made as early as 1869?

173 Ans. I don't know.

X Ques. 168. Was it made as early as 1870 or 1871?

Ans. Not under that name, it was not.

X Ques. 169. Under what name was it made then?

Ans. It was originally called the "Home Friend."

X Ques. 170. When was that stove made and put on the market, how early?

Ans. Oh, I don't know; they were both the same stove with a little change in the ornamentation.

X Ques. 171. I want to know how early you began to make that stove called the "Home Friend"?

Ans. I don't know.

X Ques. 172. About how early?

Ans. I don't know; I don't know anything about it; it was before I came there.

X Ques. 173. Can you state when the name was changed?

Ans. I suppose I could by looking up this data that I have here; that is what I am trying to find out now (looking at papers;) the first time that we commenced to make the "Home Friend" under the name of the "Golden Crown" I find by my memorandum was in 1874.

X Ques. 174. How long did the manufacture of that stove continue?

Ans. Two years.

X Ques. 175. Did that stove contain any of the Keep improvements?

Ans. I don't remember.

X Ques. 176. Before the name was changed did it contain any of the Keep improvements?

Ans. It is my impression that it did not.

X Ques. 177. What is your impression as to it containing the Keep improvements after the name was changed?

Ans. My impression is it had none in it.

X Ques. 178. During the time that Mr. Keep was employed
174 in your establishment how many other kinds of cook stoves were made there which did not contain the Keep improvements?

Ans. They vary very much in different years; if you will name some year I will be able to tell you; we were constantly making new stoves and discarding old ones; I can't tell you.

X Ques. 179. Well, you made several different kinds, didn't you?

Ans. That is what I just said.

X Ques. 180. Did you acquire any consent to make such other stoves?

Ans. Mr. Cowen says it is such a foolish question I don't know how to answer it.

X Ques. 181. How did you acquire any right or permission to make such stoves from anybody? Did you require any right or consent to make these other stoves just spoken of?

Ans. It didn't need any consent; we had a right to make those which were our own; we didn't require any right.

X Ques. 182. In your answer to question 58 where you say you were not enabled to sell the stove having the Keep design for 25 cents more than you would with any design that was in use at that time? Did you mean anything in your answer than that you put no greater price on the stove by reason of that design?

Ans. I mean to say it would not have brought any greater price than we used to charge for the stove without that design—the same stove; it did not actually bring any greater price than the stove previously made without the design.

X Ques. 183. Did you put any greater price on that stove than you did before the particular design was made? Did you ask any more for them?

Ans. No; didn't ask any more for the Stewart stove with the alleged improvements on than we did before.

175 X Ques. 184. With this design of Mr. Keep on the stove you put the stove on the market at the same price that you did without the design—that is what I understand?

Ans. Yes, sir.

X Ques. 185. That is what you meant by your answer to question 58, I take it?

Ans. What did I say in question 58?

X Ques. 186. You said, "Were you enabled to sell it for 25 cents more than you would with any designs that were in use at that time? Ans. No, sir."

Ans. Yes, that's what I meant.

Redirect examination.

By Mr. COWEN:

Ques. 187. What stoves did the contract with Stewart and Keep relate to?

Objected to as immaterial, incompetent and secondary.

Mr. COWEN: I offer the evidence in explanation of what he said in regard to these other stoves—that he did make the other stoves without anybody's consent.

Objection sustained.

Ques. 188. At what time, in what year, were Mr. Keep's improvements, to wit: The flue plates, the raised hearth and doors, the offset bottom, the damper, the water-back and the ash pan first introduced into the Stewart stove?

Ans. 1869.

Ques. 189. In what year was the stove with the Keep improvements first put on the market to any large extent?

Ans. In 1871 and 1872.

176 Ques. 190. Between 1869 and 1873 were the old stoves of the pattern prior to 1869 largely sold by the firm?

Ans. Yes, sir.

Ques. 191. Did the new stoves with the Keep improvements sell for any larger price than the old stoves without the Keep improvements?

Ans. No, sir.

Ques. 192. In your judgment as a stove merchant was the market value of the stoves with these improvements introduced into them any greater than the market value of the former stoves without those improvements?

Ans. It was not.

Ques. 193. At what time were the Keep grates introduced into the Stewart stoves?

Ans. In 1872.

Ques. 194. After that did you sell Stewart stoves with the old grates in them?

Ans. A great many.

Ques. 195. Did you sell the new stoves with the Keep grate in for any greater price than you charged and received for the old stove with the other grate in it?

Objected to as immaterial; the Keep grate was an entire patent, and as the witness has already testified was interchangeable with other grates, and therefore immaterial whether he sold for any more or less with the Keep grate than without it.

Objection overruled. Complainant excepts.

Ans. We did not.

Ques. 196. What year did you introduce the Keep design into the Stewart stove?

Ans. 1875.

Ques. 197. After that design was used by you did you sell the Stewart stove, made according to that design, for any higher price than you sold that stove before you commenced using that design?

177 Ans. We did not.

Ques. 198. In your judgment, was the market value of the Stewart stove, constructed according to the Keep design, any greater than the former stove without the design—actual market value?

Ans. It was not.

Ques. 199. In your judgment, was the value of the Stewart stove (the market value) with the Keep grate any greater than the value of the Stewart stove with the former long-bar grate that you had used in it?

Objected to as immaterial and incompetent. Overruled. Complainant excepts.

Ans. It was not increased.

Ques. 200. Were grates in stoves and grates in cook stoves a well-known device prior to 1869?

Ans. Yes, sir.

Ques. 201. And prior to 1872, of course?

Ans. Yes, sir.

Ques. 202. Were grates used in cook stoves, consisting of a frame with transverse bars running across from one side of the frame to the other, prior to 1872 a well-known device?

Ans. Yes, sir.

Ques. 203. Were grates also used with two vibrating frames, one on each side, which contained transverse bars?

Ans. Yes, sir.

Complainant objects, and objects to this kind of testimony as immaterial. Overruled. Plaintiff excepts.

Ques. 204. The grates in use in which the transverse bars on each side of the grate could be made to vibrate alternately by vibrating a central bar, or pivot—made to vibrate horizontally—made to alternately vibrate in a horizontal plane by vibrating a central bar.

178 Objected to. Overruled. Complainant excepts.

Ans. They were.

Ques. 205. In what respect was the grate invented by Mr. Keep altered from the long-bar Stewart grate?

Same objection and exception.

Ans. It gave the cross-bars somewhat more of a vertical motion.

Ques. 206. It gave the cross-bars, in addition to the horizontal vibration, a slight vertical one?

Ans. Yes, sir.

Ques. 207. Then, in your opinion, what did Mr. Keep's improvement consist in as compared with what you call the long-bar Stewart grate?

Same objection and exception.

Ans. It gave the cross-bars more of a vertical motion; a slight vertical motion in addition to the transverse motion.

Ques. 208. It has been proved that between February, 1878, and January, 1882, you sold a large number of grates separately from the stoves; what were the grates sold separately from the stoves during that time, and what were they sold for?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. They were sold for the use of the Stewart stoves that had been made under our contract with Mrs. Stewart, and they were of the Stewart and Keep pattern.

Ques. 209. You mean by that that they were what has been called the long-bar grate?

Ans. Long-bar and short-bar grate.

Ques. 210. During that time did you sell a large number of the long-bar grates as well as the Keep grates?

179 Ans. We did.

Ques. 211. Did you sell the Keep grates during that time for any greater price than that for which the long-bar grates for the Stewart stove were sold?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. We did not.

Ques. 212. You charged and received the same price for each kind of grate?

Ans. Yes, sir.

Ques. 213. In your judgment had the Keep grate any greater market value than the long-bar Stewart grate?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. It had not.

Ques. 214. Which was the most expensive grate to make, which cost the most?

Same objection, ruling and exception.

Ans. The Keep grate.

Recess to 2 p. m.

Ques. 215. One of the devices for which Mr. Keep claims to recover profits is a damper; what was the peculiarity of the Keep damper? What was the alleged improvement, what did it consist of?

Ans. The Keep damper was made in diamond shape on the side, so in drawing or closing a slide-damper you could leave a very small opening if desirable.

Ques. 216. Did you regard that damper as being of any advantage to the stove?

Ans. No particular advantage.

Ques. 217. That is, over the damper in use before it?

180 Ans. No, sir.

Ques. 218. One of the things for which he seeks to recover is what he calls his ash plate?

Ans. It is the front oven plate or ash chute.

Ques. 219. What effect did that have upon the operation of the stove?

Ans. The effect was bad.

Ques. 220. In what way?

Ans. It allowed the lodgement of ashes, and burned out the grate rapidly; caused the grate to burn out rapidly.

Ques. 221. In your opinion was it an advantage or an injury to the stove?

Ans. Very great detriment.

Ques. 222. You have stated that you had a uniform price for the Keep grates; did you always obtain that price, or what was your custom?

Ans. Our custom was to charge on the books the uniform price, but at times of settlement with our customers we made very large deductions.

Ques. 223. On these grates?

Ans. Yes, sir.

Ques. 224. What was the object in charging more than you finally demanded?

Ans. To keep the price up for the retailer.

Ques. 225. One of the articles for which Mr. Keep seeks to recover is what he calls his water-back—do you recollect that?

Ans. Distinctly.

Ques. 226. Was the water-back usually included in the price of the stove, or charged as an "extra"?

Ans. Charged as an "extra."

Ques. 227. What were you accustomed to use before Mr. Keep introduced his invention?

Ans. Coil of gas pipe.

Ques. 228. State the object of the water-back and where it is placed?

Ans. It is placed over the back of the fire-box, and from
181 the reflected heat the water which passes through is heated and passes into a boiler for circulation through the house.

Ques. 229. It is used for heating water in the boiler attached to the stove?

Ans. This boiler is connected with the stove by pipes; it is what is called a bath boiler.

Ques. 230. According to your recollection was the Keep water-back any improvement on the old coil?

Objected to as immaterial, it being sold as an "extra." Objection overruled. Complainant excepts.

Ans. No, sir; it was a detriment.

Ques. 231. It was not so good as the old coil?

Ans. No, sir.

Ques. 232. What was the difficulty with it?

Ans. It interfered with the draft of the stove; it filled up too much of the flue.

Ques. 233. Did you sell any large number of them?

Ans. No, sir.

Ques. 234. Only a few?

Ans. A few only.

Ques. 235. According to your recollection of the cost and selling price of the old coil water-back and the cost and selling price of the Keep water-back, upon which did you make the most profit?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. We made decidedly the most on the old coil water-back.

Recross-examination.

By Mr. DAVENPORT:

X Ques. 236. I think I understood you to say that in all these improvements, the Keep improvements, so called upon this
182 stove, there was no difference in the price asked or charged for the stove with these improvements or without. Am I correct?

Ans. I stated so, except there were the variations of the market, which would put the price up or down.

Redirect examination.

By Mr. COWEN:

Ques. 237. But you asked no more for the stove with the improvements than you did without them?

Ans No, sir.

CHARLES A. MCLEOD, a witness produced by the defendants, being duly sworn, to interrogatories propounded to him did make answers as follows:

Examined by Mr. COWEN:

Ques. 1. You may give your name, age, residence and occupation.

Ans. Charles A. McLeod; age, 50 years; residence, Troy, N. Y.; occupation, stove manufacturer.

Ques 2. How long have you been engaged in the business of stove manufacturing?

Ans. Over twenty years.

Ques. 3. Did you know the former firm of Fuller, Warren & Co.?

Ans. Yes, sir.

Ques. 4. Were you acquainted with the Stewart stove formerly manufactured by that company?

Ans. Yes, sir.

Ques. 5. Did you know William J. Keep, formerly in the employ of Fuller, Warren & Co.?

Ans. I did.

Ques. 6. Are you acquainted with the flue plates alleged to have been invented by Mr. Keep and introduced into the Stewart stove about 1869?

183 Ans. Yes, sir; I have seen them.

Ques. 7. Do you know their construction and their mode of operation?

Ans. Yes, sir.

Ques. 8. I wish you would state whether or not, in your opinion, the use of those flue plates was any advantage to the stove in which they were placed?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. I think it was a disadvantage.

Ques. 9. For what reason?

Ans. It interfered with the draft of the stove.

Ques. 10. Do you think the market value of the Stewart stove containing these flue plates was any greater than the market value of the stove without those, or as much?

Ans. I think it was not as much.

Ques. 11. Were you acquainted with the alleged invention of Mr. Keep relating to the raised hearth on the doors of the stove?

Ans. I was.

Ques. 12. Did you experiment with that construction?

Ans. Yes; we put onto a stove of our manufacture a raised hearth about the same time.

Ques. 13. In your judgment, was the use of that invention (the raised hearth and doors) any advantage to the stove in which it was placed?

Objected to as immaterial. Overruled. Complainant excepts.

Ans. I think it was not.

Ques. 14. Was a Stewart stove containing that invention worth any more in the market than a Stewart stove that did not contain it?

Same objection, ruling and exception.

184 Ans. It was not.

Ques. 15. Were you acquainted with the invention that Mr. Keep calls his "offset bottom"?

Ans. Yes, sir.

Ques. 16. In your judgment, was the use of that device any advantage to the stove, or did it increase its market value?

Same objection, ruling and exception.

Ans. No, sir.

Ques. 17. Were you acquainted with Mr. Keep's diamond opening damper?

Ans. I have seen the damper.

Ques. 18. Do you think the use of that was any special advantage?

Ans. I don't think it was any advantage over the other damper.

Ques. 19. How was it with the ash pan; were you acquainted with his bailed ash pan?

Ans. Yes, sir.

Ques. 20. What do you say as to the value of that ash pan to a stove in which it was placed?

Same objection, ruling and exception.

Ans. A damage to the stove.

Ques. 21. For what reason?

Ans. Well, on account of the handle being placed so the ashes would drop upon it; it was not convenient to use as is the ordinary bailed ash pan.

Ques. 22. Are you acquainted with Mr. Keep's design patent for a Stewart stove?

Ans. Yes, sir.

Ques. 23. Do you think a stove made according to that design was worth any more in the market than one made according to the old design?

Ans. I do not.

Cross-examined by Mr. DAVENPORT:

X Ques. 24. Do you know why the flue plate spoken of was put into that stove—the object of putting it in?

185 Ans. It was to carry the heat around under the oven.

X Ques. 25. Is that an important feature in a cook stove?

Ans. Very.

X Ques. 26. Did you ever see one of these Stewart stoves in operation with that flue plate in it?

Ans. I have not.

X Ques. 27. Do you know anything about the effect of any of these improvements you have mentioned upon the selling value of the stove?

Ans. I know these improvements injured the sale of the stove very much, as a matter of fact.

X Ques. 28. How did you ascertain that fact?

Ans. From the number of stoves that were sold after these improvements were put in.

X Ques. 29. How do you get at the number of stoves sold after these improvements were put in?

Ans. I have seen the statement.

X Ques. 30. Made by whom?

Ans. Well, I think the statement is in this case.

X Ques. 31. Upon what do you base your judgment as to the value of these various devices you have spoken of? I mean do you base it upon what you have learned in relation to the falling off of the sales or from your knowledge of it?

Ans. In regard to the raised hearth we put that upon the stoves ourselves.

X Ques. 32. You satisfied yourself that that was not a good thing?

Ans. Yes, sir; in regard to the other inventions I have no personal knowledge.

X Ques. 33. About the effect upon the selling value of the stove with these various devices in except from the statement made by defendants as to the number of stoves sold?

Ans. That and my general knowledge of the stove trade.

186 X Ques. 34. Do you attribute the falling off in the Stewart stoves during that time solely to these improvements which you have spoken of?

Ans. That is my opinion.

X Ques. 35. Can you say in what year they had any particular falling off in the sales?

Ans. Well, I think the second year after they were put in.

X Ques. 36. Through those years which you refer to did you notice any falling off in the sales in your own stove—stoves made by your firm?

Ans. I think the sales increased.

X Ques. 37. In what years?

Ans. Well, from 1871 to 1874, including 1873 I mean, up to 1874.

X Ques. 38. Was there a falling off after that?

Ans. I think there was a very great falling off in 1874 and for several years after; there was in our business.

X Ques. 39. To what was such falling off due?

Ans. To the "panic" of 1873.

X Ques. 40. Then any falling off subsequent to 1873 you would not attribute to these improvements solely in regard to the sale of the Stewart stove?

Ans. It would be a falling off proportioned to the general business falling off.

X Ques. 41. You would not attribute it solely to the Keep improvements?

Ans. No, sir; partially to the general state of business.

X Ques. 42. Then do I not understand you to mean that you have no knowledge from your connection with the sale of Stewart stove of the effect produced in the market by these improvements except as you have stated?

Ans. You do.

X Ques. 43. The Keep design upon the Stewart stove—why do you say it would not enhance the selling value of the stove?

187 Ans. Well, my opinion is it would not.

X Ques. 44. It is only a matter of opinion?

Ans. Yes, sir.

X Ques. 45. That design is a mere outward ornamentation?

Ans. Yes, sir.

X Ques. 46. It might be a mere matter of taste with people whether it would bring more or less?

Ans. It might be.

X Ques. 47. I think I understand you to have said that you had

never seen a Stewart stove in operation with any of these devices you have mentioned in?

Ans. I never have.

X Ques. 48. And you have never tried them in any way in your own stoves except as to the raised hearth?

Ans. That is all.

X Ques. 49. And was the stove in which you tried that a stove like the Stewart?

Ans. Well, it was a cooking stove; first-class cooking stove.

X Ques. 50. How many kinds of cooking stoves are you making?

Ans. I think it is 225 different kinds and sizes and styles.

X Ques. 51. How many of these are of different kinds, without relation to different sizes of the same kind?

Ans. How many are we making now?

X Ques. 52. Yes.

Ans. Thirty or forty; each one has three or four tops on.

X Ques. 53. About how many different styles of cook stoves did you make in 1869?

Ans. Well, I think the number was somewhat less.

X Ques. 54. Is it in the manufacture and sale of stoves a
188 necessary or an important feature that your styles and kind of cook stoves be frequently changed?

Ans. It is.

X Ques. 55. That is done for the purpose of holding or making the market, isn't it?

Ans. I suppose it is; I might add that previous to 1873 the styles were not changed as they have since, not so frequently changed.

X Ques. 56. Haven't you found it necessary in the business to frequently change the styles and forms of your cook stoves without any material change in their operation?

Ans. Yes, sir, we have.

X Ques. 57. Are not such various changes then for the purpose of making increased sales of the stoves rather than to increase their value?

Ans. Yes, sir.

Redirect examination.

By Mr. COWEN:

Ques. 58. Do you always add anything to the selling price of a stove when you change the design?

Ans. According to the cost of constructing it.

Ques. 59. Your statement as to the value of these inventions was founded on your experience as a stove manufacturer?

Ans. It was.

Ques. 60. And was intended by you as an opinion?

Ans. Yes, sir.

L. W. DRAKE, recalled on behalf of defendants.

Examined by Mr. COWEN:

Ques. 377. Do you remember the introduction of the Keep water-back into the Stewart stove?

Ans. Yes, sir.

189 Ques. 378. Mr. Keep, in his direct testimony, states the cost charged by Brown & Co. for those water-backs at a dollar forty for sixty, and $1.50 for the remaining 84. Now, what did that cost represent?

Ans. Cost of the cast iron.

Ques. 379. Simply the cost of the casting?

Ans. Yes, sir.

Ques. 380. In addition to the cost of the casting what was necessary in order to make a complete water-back in the condition in which you sold it?

Ans. Leader and elbow.

Ques. 381. Pipes and couplings, and such things?

Ans. Leader, elbow and couplings; side pipes were not sent out unless called for.

Ques. 382. They were no part of your extra charge?

Ans. No, sir.

Ques. 383. But the leader, couplings and elbow were?

Ans. Yes, sir.

Ques. 384. Have you estimated the additional cost of these different devices in addition to the cost of the casting between 1877 and 1882?

Ans. Yes, sir.

Ques. 385. Will you please state what the additional cost, in addition to the casting, was? Give the items if you can.

Ans. The cost of cleaning, drilling, tapping and testing, 30 cents.

Ques. 386. You had to drill and tap this water-back in order to insert the pipes?

Ans. Yes, sir; I said "drilling"—it should be "reaming."

Ques. 387. The cost of that was 30 cents?

Ans. Yes, sir; the cost of the elbow and leaders was 32 cents; couplings, $1.25.

Ques. 388. Making a total of what?

Ans. $1 87.

190 Ques. 389. That was the actual cost, to be added to the $1.40 and $1.50 charged by Brown & Co.?

Ans. Yes, sir.

Ques. 390. What device was used in the stove as a water-back prior to the time when the Keep water-back was introduced?

Ans. Gas-pipe coil.

Ques. 391. What was the cost of that arrangement?

Ans. Somewheres in the neighborhood of $1.25; about $1.25.

Ques. 392. That didn't need this tapping and drilling, &c.?

Ans. No, sir.

Ques. 393. For how much did you sell the coil water-back?

Ans. Three dollars.

Complainant objects to the question as to the cost of the coil water pipe. Objection overruled. Complainant excepts.

Cross-examined.

By Mr. DAVENPORT:

X Ques. 394. Was that reaming, tapping, testing and cleaning done upon the water-backs before they were sold?

Ans. Yes, sir.

X Ques. 395. In all cases?

Ans. Yes, sir.

X Ques. 396. Necessarily?

Ans. Yes, necessarily so.

X Ques. 397. How did you get at the cost of these various parts?

Ans. By taking the number of water-back- that a man could do in a day at so much a day.

X Ques. 398. Where did you get that information?

191 Ans. Partly from my own knowledge of what we used to pay for it.

X Ques. 399. Where did you get the rest?

Ans. From the books.

— Ques. 400. Then do your books show the cost of making these water-backs?

Ans. In a certain sense they do.

X Ques. 401. In what sense?

Ans. I don't know that I can explain it exactly.

X Ques. 402. How much did one of these water-backs weigh?

Ans. Twenty-one pounds for the 4½ and 23 pounds for the 5½; I am going by Mr. Keep's figures.

X Ques. 403. How do you ascertain the cost of the castings?

Ans. I haven't sworn to any cost; I assumed Mr. Keep was correct.

X Ques. 404. You have assumed he was correct in the cost of his water-backs?

Ans. He says that is what he paid Mr. Brown.

X Ques. 405. Can you state the cost of the casting of the water-backs?

Ans. Well, you figure the casting of the water-back only; taking them out of the general production, they would cost about ten cents a pound for the castings.

X Ques. 406. Do you mean to say that to have those water-backs outside of your shop it would cost ten cents a pound?

Ans. Yes, sir.

X Ques. 407. What part of that would be represented by cast iron, and what part by labor?

Ans. It would be nothing but merely the cast iron; there would be no labor attached to that; it would not include any extra labor.

X Ques. 408. You don't mean that the iron itself would cost that?

Ans. I mean when you go to the Ludlow valve works they

192 would charge you ten cents a pound for it; I mean after it is moulded and cast it would be ten cents a pound.

X Ques. 409. I ask you what part of that represented the iron and what part the labor?

Ans. That I don't know that I could state, for I don't know what the Ludlow valve works pay their men for their labor; I know that is what we paid them three years ago when we had them made there.

X Ques. 410. Then you don't know what part would represent iron and what part labor?

Ans. No, sir; not on that cost.

X Ques. 411. How do you get at the weight of these?

Ans. By weighing each piece.

X Ques. 412. You have weighed them?

Ans. Yes; I have weighed them in times past; in answering your question I took Mr. Keep's figures; I should judge they were about right as near as I can remember.

X Ques. 413. How can you say that your books show the cost of these water-backs?

Ans. It don't show only as we figured out the cost.

X Ques. 414. Do you know that there are any books in your possession which show the cost of these water-backs?

Ans. There are no books that show the cost only as we figured out the cost at so much a pound; taking the cost of cast iron as we estimated it at so much a pound, and adding the labor, &c., to it.

X Ques. 415. What did you estimate the cost of cast iron?

Ans. I don't know exactly; I think five cents a pound in those days.

X Ques. 416. The raw iron at five cents a pound?

Ans. Yes, sir.

X Ques. 417. What year was that?

Ans. Well, along in 1872 and 1873.

193 X Ques. 418. When you estimated the iron at five cents a pound do you estimate the labor at five cents a pound more?

Ans. No, sir; I don't figure it in that way.

Redirect examination.

By Mr. COWEN:

Ques. 419. These couplings, leaders and elbows were part of the merchandise account, and the cost of those would be found on the books?

Ans. Yes, sir.

Ques. 420. The labor you estimated?

Ans. Yes, sir.

The defendants here rest.

L. W. DRAKE.

Further hearing adjourned.

TROY, N. Y., *Sept. 13th*, 1886.

The parties met pursuant to agreement.

Mr. Cowen being compelled to leave temporarily, reserves the right to make any objections he may desire.

WILLIAM J. KEEP recalled by complainant.

Examined by Mr. DAVENPORT:

Ques. 110. In answer to question 59 of Mr. L. W. Drake's testimony on the part of defendants he states, in substance, that as to the 3½, 4½ and 5½ grates, as a general thing, the books would fail to show whether they were long-bar or short-bar grates; please state whether it can be determined from the books whether the grates were long-bars or short-bars, and if so, how.

194 Ans. There can be no doubt as to which grate is referred to in the books; there are only three kinds of entries, one the grate marked "D. G. Stewart, S" grate; the second where this is succeeded by the figures "1873," and the third by "1869;" in the first of these cases the Keep grate is always referred to where there is no "1873" or "1869" after it; in the second case with "1873" after it the Keep grate is always meant, and in the third case with "1869" after it, as Mr. Drake says, the question might be doubtful, because as he says in his testimony they sometimes shipped one and sometimes the other; I find on Mr. Drake's shipping book in some such cases that he has recorded as shipped simply "D. G. Stewart, S" grate, where an 1869 pattern was ordered, and also charged on the sales book; in this case evidently he shipped the Keep grate in the place of the other; the reason why I say that "D. G. S. grate" always refers to the Keep grate is this—that from the time these grates were made and first shipped, and for three years after, I was personally with Fuller, Warren & Co., and was acquainted with the method of making entries, and this was the entry made when Keep grates were shipped; I find by examining the books that no change is made to indicate that such entry means anything but Keep grates; there is a reason why Fuller, Warren & Co. would not ship an 1869 grate unless specially ordered, which was this—the 1869 grate was short-lived, sometimes only lasting a few weeks and never as long as a grate should last, therefore damaging the reputation of Fuller, Warren & Co.; this 1869, or long-bar grate, was made of two bars running the whole length of the fire-box and the fire caused these bars—the back bar especially—to curl up so as to make the grate inoperative; these difficulties the Keep grate remedied, because the bars ran the other way and only long use affected the bars at all.

195 Ques. 111. In answer to question 69, Mr. Drake states that it was not the general practice to designate the grates on the books as 1873 or 1869 grates; he testifies the books did not generally designate them; how do you find the books to accord with that answer?

Ans. This is correct; the majority of entries are simply, "D. G. shaking grate," meaning the Keep grate.

Ques. 112. Then he states in answer to question 70 that it would be impossible for any person to tell whether they were Keep grates, or what they were; is that so?

Ans. It would be impossible for an expert who was not acquainted with the business of the defendants to tell, but any one acquainted

with their business, and knowing what their abbreviated entries mean, would know.

Ques. 113. In answer to question 81 Mr. Drake says that the Keep grates, apart from the Stewart stoves, would be valueless for any purpose than for old iron; please state whether or not the Keep grate was put into any other stoves than the Stewart stove between February 1, 1876, and January 1, 1882.

Ans. During the year 1876 this grate was put into a stove that I made myself, called the "Rubicon," and in 1878, or thereabouts, into another stove called the "Rapidity," and some time during this period the grate was adapted to a stove called the "Director," made by the defendants.

Ques. 114. Now, aside from the manufacture and sale of these Keep grates by yourself and the defendants, were they manufactured by any other parties?

Ans. During this period they were made by several parties in Boston.

Ques. 115. State whether or not the grate was put into the
196 stoves you have named, and whether they could be put into different kinds of stoves by making changes in the frame, or otherwise.

Ans. The invention pertained to the grate, and this grate could be applied to any stove in the market by making a frame to fit it, and the grates would fit several Stewart stoves made by Fuller, Warren & Co. by simply altering or making a frame to go with it, and the same grates would fit the frames of the "Rubicon" and the "Rapidity" referred to; the defendants used three sizes of grates, these grates fitting the frames of six stoves, with the exception that in two sizes, and, perhaps, three of the 1869 stove, one piece of the grate, and, perhaps, two, had to be altered in form; the bars (that is, the cross-bars) of all grates were the same—made originally from the same patterns.

Ques. 116. In answer to question 82 of Mr. Drake's testimony he states that there was nothing on the books of the defendants by which anybody could, in his opinion, tell whether the grates sold as long or short bar grates were applied to old stoves, in which other forms of grate had been used; what do you find from the books in this respect?

Ans. Where grates numbered 3½, 4½ and 5½ "D. G. Stewart, S." grate were found on the books during the said period such Keep grates were always applied to stoves which had been sold without these grates, because no stoves numbered 3½, 4½ and 5½ which would take either the Keep grate or the 1869 grate were ever sold with the Keep grate.

Ques. 117. In answer to question 127 Mr. Drake states that Nos. 6½, 7½, 8½ and 9 had a short-bar and long-bar grate for such patterns, and were either designated as "C. F." or "N. C." generally; please state if that is correct in all respects?

Ans. He has evidently made a mistake in mentioning 6½, as there was no such stove; there were only three sizes for these stoves,

7½, 8½ and 9; there was a short-bar grate and a long-bar
197 grate; the short-bar being the Keep grate, but the long-bar was not the 1869 grate, but was a grate originally made for a coal grate and sometimes used for coal, especially by eastern people, but was always designated on the defendants' books as a wood grate.

Ques. 118. In answer to question 138 of Mr. Drake's testimony he states that the wood grates spoken of belong to the stoves for wood only; now state whether the wood and coal stoves were different or not.

Ans. The stoves were the same whether to be used for wood or coal, the only difference being that for wood the coal linings were left out and a wood grate sent in place of a coal grate.

Ques. 119. In answer to question 163 Mr. Drake states that after the grates were shipped the only account of such grates would be found upon the sales book; did you find the account of such grates upon other books than the sales book?

Ans. I found them in other books; I found them in some cases on the order books, and I examined the whole of the shipping books in addition.

Ques. 120. In answer to cross-question 171, Mr. Drake states that the pages marked on the exhibit or schedule No. — (referred to in the answer to questions 7 and 109 of William J. Keep) do not correspond with the pages of the sales books; please state if there is any reason for their not corresponding.

Ans. The reason is that the sales books are simply books of tissue paper without any page numbers on which were copied the invoices.

Ques. 121. In answer to cross-question 174, Mr. Drake states that he did not examine the order book for the reason that the first page of the schedule referred to in Mr. Keep's answer, No. 100, showed the grates that had been ordered for the month of January,
198 and that the next one (February) was taken from the sales book, and those orders might have been carried over and not shipped until February; can you give any reason for saying that those orders might or might not have been carried over and not shipped until February?

Ans. The reason I took the order book for the month of January and not the sales book was because the defendant claimed that they had no sales book for that month, it having been burned in their fire; none of the grates recorded there as ordered in January were shipped in February, but were all shipped in January; this I know because in the order book across each entry is recorded in pencil the date at which the shipments were made, and when I came to the first date which was marked as shipped February 1st, I stopped recording grates.

Ques. 122. In answer to cross-questions 176 and 177 by Mr. Drake, he states that the Keep grates were designated on the books as 1873 short-bar grates, and so designated on the sales book: that "in some cases they were marked 1873 pattern, and when they were so marked we knew they were the Keep grates;" now please state

if those were the only designations of the Keep grate upon the book.

Ans. When they were marked "1873" they would know they were Keep grates; generally the Keep grates were designated, as I have said, "D. G. Stewart, S." grate; those grates always meant Keep grates.

Ques. 123. In answer to question 378 Mr. Drake states that the cost of the water-backs, $1.40 and $1.50 as given by Mr. Keep, only represented the cost of the cast iron, and in answer to the next question (379) he states that it represented the cost of the casting; please state if the statement you made as to cost included only the cast iron or the casting, and if not what it did include, if anything?

199 Ans. It included all that was shipped and charged for on the sales book.

Ques. 124. Did that cost include a leader, elbow and couplings, as stated by Mr. Drake in answer to questions 380 and 381?

Ans. It included the water-back proper, fire-back (which was a part of it), two leaders or nipples and two elbows; couplings were not shipped unless specially ordered and were extra.

Ques. 125. In answer to questions 387, 388 and 389, Mr. Drake states that the cost of reaming was 30 cents, the cost of the elbow and leaders was 32 cents, and of the couplings $1.25, making a total of $1.87, which was the actual cost to be added to the $1.40 charged by Brown & Co.; now do you know whether that statement is a correct one as to the cost of those water-backs, and if so, how do you know?

Ans. His statement is not correct, as the water-backs came from Brown & Co., complete with the exception of the fire-back which was made by the defendants and added afterward.

Ques. 126. Do you know what the cost of the fire-back was?

Ans. I cannot tell except the whole total weight.

Ques. 127. What was the whole total weight?

Ans. The total weight of the 4½ was 18 pounds, including the fire-back; the 5½ was 20 pounds, including the fire-back; however, this does not include the leaders or elbows.

Ques. 128. What did Brown & Co. charge per pound for water-backs?

Ans. They didn't charge by the pound; they furnished the whole complete, the 4½ for $1.30 and the 5½ for $1.35; then I added 10 cents and 15 cents for the cost of the fire-back, which made the amount that I gave in my former testimony, viz: $1.40 and $1.50.

Ques. 129. When you say "complete" what parts do you mean?

200 Ans. I mean the water-back, two nipples, or leaders, and two elbows, but no fire-back.

Ques. 130. When you stated that Brown & Co. furnished them at the price you have named complete, did that include all the labor of framing and drilling, as well as the nipples and elbow, or not?

Ans. It did.

Ques. 131. You have said that the price they furnished them at did not include the fire-back; what was the weight of that fire-back, as near as you can give it?

Ans. Seven pounds and four ounces.

Ques. 132. How much did they cost per pound?

Ans. 3½ cents, probably.

Ques. 133. The 10 and 15 cents, then, that you added to the prices of Brown & Co. would not quite cover the cost, would it?

Ans. No, sir; I see I made a mistake; I ought to have added 27 cents to each, instead of 10 and 15 cents, which would make a total cost of $1.67 and $1.77.

Ques. 134. In answer to cross-question 408 Mr. Drake states that the Ludlow valve works charged them 10 cents a pound for the water-back after it was moulded and cast; do you know what their charges are for making these water-backs, and if so, state, and what it included?

Ans. Their charge is 10 cents a pound, and such charge includes reaming, tapping and testing; it does not include the leaders or elbows; this I know, because from 1876 until 1880 they made water-backs for me at that price, and including such work; their charge is uniform for all ordinary water-backs.

Ques. 135. Do you find upon the defendants' books entries as to what these water-backs sold for, and if so, what entries do you find?

Ans. I find upon their books that the price they charged
201 was $3.50 in some cases; generally charged that; I find a great many such entries; I also find some at $3.00; I also find on defendants' sales book, under date of May 16th and May 25th, 1878, a sale of a 4½ water-back and couplings (everything complete) for $11.50.

Ques. 136. Where was it sold?

Ans. It was sold to E. P. Carpenter, of Pawtuxet, R. I.

Recess to 2.30 p. m.

Ques. 137. Prior to the manufacture of the Keep grate what grates were made by the defendants for the Stewart stove, or other stoves?

Defendants' counsel objects as immaterial.

Ans. Each of the stoves outside of the Stewart stove made by them had a grate of its own; the Stewart stove of 1838 had a grate made for it; in 1851 the Gardner grate was applied to all Stewart stoves that they used for coal, and superseded all others for that fuel; in 1869 a new stove was made by the complainant in this suit, and in it was put a grate patented by David Hathaway, and called a Hathaway or long-bar grate; owing to the weakness of this grate, and being very short lived; in the latter part of 1872, the Keep grate was made, which at once superseded the Hathaway grate, being put in a new stove called the 1873 stove made at that time, and being supplied in place of the long-bar grates originally supplied to the stoves made prior to 1873; each of these stoves had a wood grate fitting it in addition to the coal grates; I have now

mentioned all the grates I know of; I remember we put a lip on the frame of the 1869 grate, so it would fit, but it would not fit the anti-clinker stoves.

Ques. 138. What other grates were made by the defendants between January, 1876, and January 1st, 1882, which would fit the Stewart stoves manufactured by the defendants other than the Keep grate, if any?

202 Ans. The 1869 grate would fit the close-front stove of 1873.

Ques. 139. And could be used in the place of the Keep grate?

Ans. Yes, sir; and the Gardner grate would fit that stove.

Ques. 140. Then the Hathaway grate, or the grate of 1869, and the Gardner grate could be used in the stoves where the Keep grate was used, could they not?

Ans. The Hathaway grate could; the Gardner grate, I think, would fit the close-front stoves made between those dates.

Ques. 141. State why the Keep grate was manufactured for such stoves instead of the other grates which could have been used in such stoves?

Ans. Because of the destructibility of the long-bar grate and the fact that the Gardner grate, if used, would not dump, it led to the construction of a grate that would be more durable, and that would dump.

Further hearing adjourned to September 14, 1886, 11 a. m.

TROY, N. Y., *Sept. 14th*, 1886—10 a. m.

Parties met pursuant to adjournment, and again adjourned to Sept. 15th, 10 a. m.

TROY, N. Y., *Sept. 15th*, 1886—10 a. m.

Parties met pursuant to adjournment.

Examination of William J. Keep suspended.

FREEMAN P. LANG, produced as a witness on behalf of the complainant, being duly sworn, to interrogatories propounded to him did make answers as follows:

203 Examined by Mr. DAVENPORT:

Ques. 1. What is your name, residence, age and occupation?

Ans. Freeman P. Lang, Phelps, N. Y.; for the past 25 years I have been occupied with cooking and parlor stoves and hot-air furnaces.

Ques. 2. Are you acquainted with complainant and defendants in this action?

Ans. Yes, sir.

Ques. 3. And for how long have you known the parties?

Ans. 25 years.

Ques. 4. What was your business prior to Jan. 1, 1882?

Ans. Clergyman; oh, prior to Jan. 1, 1882, for some years back I was occupied with stoves, furnaces, ranges, and all kinds of stoves,

practically and experimentally, and as an expert and superintendent.

Ques. 5. By whom were you employed?

Ans. I have been employed for the largest portion of that time by Fuller, Warren & Co. and the Fuller & Warren Co., and the Richardson & Boynton Co.; for the largest portion of the time by Fuller, Warren & Co.

Ques. 6. How long were you connected with the defendants as employee or otherwise in the sale or the business of stoves?

Ans. 17 years; for the old firm for 15 years; I was two years with the Fuller & Warren Co.

Ques. 7. When did your connection with that firm cease?

Ans. With Fuller, Warren & Co. it ceased 10 years ago, which would be 1876; the new company was not formed until after that; January 1st, 1882, it was formed; I went out of the employ of the firm about the close of the year 1876.

Ques. 8. You didn't re-enter their employ?

Ans. I entered the employ of the Fuller & Warren Co.; that was four years ago.

204 Ques. 9. During the time you were employed by the defendants what was your particular business?

Ans. I was occupied as a salesman and exhibitor, and as a furnace man to locate and lay out furnace work for houses and direct the putting of them in.

Ques. 10. Were you acquainted with P. P. Stewart?

Ans. I was very well acquainted with him.

Ques. 11. He was the patentee of the stove known as the "Stewart" stove.

Ans. Yes, sir.

Ques. 12. Were you ever in his employ?

Ans. One year.

Ques. 13. In what capacity?

Ans. As an experimenter and salesman.

Ques. 14. State, if you are acquainted, and to what extent, with the construction and operation of the so-called Stewart stoves.

Ans. I am very well acquainted with the construction and operation of the Stewart cooking stove.

Ques. 15. State whether or not you are acquainted with the so-called "Keep improvements," and to what extent.

Ans. I am quite familiarly acquainted with the improvements that Mr. Keep put upon the Stewart cooking stove.

Ques. 16. Are you, and were you, acquainted with the details of the construction and operation of the Stewart stove before Mr. Keep's so-called improvements were added, and also after?

Ans. Yes, sir; with both.

Ques. 17. I would like to have you state how you have familiarized yourself with such stove before and after the so-called improvement.

Ans. The first year I was connected with Fuller, Warren & Co. I was under the immediate direction of P. P. Stewart, which was 1860

or 1861, and I think 1861, and I was experimenting and ex-
205 hibiting in connection with Mr. Stewart a good deal that year, and received a great deal of instruction from P. P. Stewart, and, in fact, was studying the stove as well as selling the stove and experimenting.

Ques. 18. Have your experiments, examinations and study of such stoves been to a certain extent that you are fully acquainted with the differences between the stove before Mr. Keep's improvements were introduced and as it was after they were introduced?

Ans. Yes, sir; I might add that one part of the business, as we were on the road, was that if there was a broken plate or anything defective found in the stove, or there was anything that the dealer didn't understand about, or how to take the stove apart and put the piece in, to instruct him how to do it.

Ques. 19. When did you first become acquainted, and under what circumstances, with the improvements of Mr. Keep?

Ans. I became acquainted with them from the time he made them; we were both employed here together and both aware of what was being made, and I had to become acquainted with everything that was being improved.

Ques. 20. Please look at complainant's patent, No. 90756, for flue plates; are you acquainted with the construction and operation of the flue plate therein described?

Ans. Yes, sir.

Ques. 21. Please look at complainant's letters patent, No. 90850, relating to raised hearths and doors, and state whether you understand the construction and operation of it.

Ans. Yes, sir.

Ques. 22. Please look at letters patent of the complainant, reissue No. 4386, and state whether or not you understand the construction and operation of the device described in said letters patent,
206 as related to ash pans.

Ans. I do.

Ques. 23. Please examine letters patent issued to complainant, No. 139,583, upon stove grates, and state whether you understand the nature, construction and operation of the device therein described?

Ans. I do; this pertains to the D. G. grate.

Ques. 24. Also examine letters patent issued to the complainant, No. 8685, design, and state whether or not you understand the design described in that patent.

Ans. Yes; this pertains to the 1873 D. G. Stewart cook.

Ques. 25. State whether the improvements and device set forth and described in the letters patent just shown you are the ones you refer to when you speak of the Keep improvements.

Ans. Yes; the same.

Ques. 26. State how the Stewart cook stoves were designated.

Ans. The Stewart cooking stove, 1859, was called the "P. P. Stewart, summer and winter, large-oven cooking stove."

Ques. 27. Was that known as the 1859 stove?

Ans. Yes, sir; the cook stoves that were issued after the Keep

improvements were gotten out were designated as the Stewart D. G., or dumping-grate cooking stove.

Ques. 28. Of 1869?

Ans. Yes, sir; the next was 1873.

Ques. 29. Was the 1869 cooking stove the first one in which any of the so-called Keep improvements were introduced?

Ans. I am not sure that Mr. Keep's improvements were in the 1869; I am not sure that they were put in till 1873; yes, Mr. Keep's improvements must have been in the 1869 stove, because the 1869 stove had a grate that would dump; yes, part of them were in the 1869 stove.

207 Ques. 30. State whether that Keep flue plate spoken of was in the 1869 stove?

Ans. I think it was, yes.

Ques. 31. And the ash pan?

Ans. Yes, sir, and the raised hearth and door.

Ques. 32. When was that 1869 stove completed?

Ans. I understand in 1869; that is the reason of its being called the "1869."

Ques. 33. After that stove was completed did you have anything to do with its sale and exhibition, and if so to what extent?

Ans. Oh, I was the salesman on the road selling that stove every year and exhibiting it more or less; exhibiting it quite considerably at the stores usually of the dealers.

Ques. 34. Any one with you in such exhibitions of these stoves?

Ans. Sometimes; before Mr. Stewart died he was sometimes with me; sometimes Mr. Keep; but I was more frequently alone, except having an assistant to knead the dough.

Ques. 35. Then you exhibited the practical workings of the stove?

Ans. Largely.

Ques. 36. How long did you continue to exhibit such 1869 stoves?

Ans. I should say that I exhibited it every year as long as it was in the market, which was in 1873, if I recollect right.

Ques. 37. State whether or not the 1869 stoves that you know were constructed, or had these various improvements of Mr. Keep put in them to remedy any defects of the prior Stewart stove, and if so what.

Ans. The old stove was "the 1859 P. P. Stewart summer and winter, large oven, cooking stove." No, it was not to remedy any defect, for there, perhaps, never was any more perfect stove made; I needn't say "perhaps"—I believe there was never such a
208 perfect stove made for what it was made, which was for wood; Mr. Keep's improvements made a coal cooking stove.

Ques. 38. What were such improvements put into the 1869 for?

Ans It was to make a convenient and first-class cooking stove for coal.

Ques. 39. State in what way Mr. Keep's improvements changed the stove of 1859 so as to make a first-class coal stove.

Defendants' counsel objects that the question calls for testimony which is properly a part of the complainant's evidence-in-chief on

this accounting; that it was the business of the complainant to show in the first instance what the value of his improvements was, and that he has no right now, after resting and hearing the defendants' testimony, to reopen his case upon that point. That both sides have gone into the question of value to considerable extent; that if this evidence is admitted it will probably render it necessary for the defendants to call their witnesses as to the same point, and this process of opening and reopening the case might go on indefinitely.

Mr. DAVENPORT: In answer to the objection I say that this testimony is offered to rebut the evidence offered on the part of the defendants that the so-called Keep improvements improved the stove out of the market, as to which no testimony was given on the part of the complainant, and none could be given anticipating any such thing.

Objection overruled. Defendants except.

Ans. You could burn coal in the 1859 stove, but it never was made for a coal stove; the ash plate under the 1859 stove was two and a half inches below the grate; there was no grate in that stove that would dump the ashes out, and if you burned coal
209 in it you had to take the ashes, cinders and all out of the top; what ashes went under were drawn out with a scraper into the ash pan on the side of the stove; to change that, in the first place, to a coal stove that ash plate must be put in on an incline, perhaps an angle of 45 degrees, so as to carry the ashes away from the grate in connection with a dumping grate, and it was a convenience when that was done to put an ash drawer so you could take up the ashes and carry them off without making a dust in the house; another improvement was that the flue in the 1859 stove was large enough for wood, which requires a smaller draft than coal, but to make a successful coal stove of it it was necessary to enlarge the flue for a better draft, which was done.

Ques. 40. Which was done how?

Ans. The flue was enlarged; the 1859 flue was smaller than the flue of the D. G. stove.

Ques. 41. State in regard to the flue plate you have spoken of?

Ans. The flue plate was changed in construction so as to enlarge the flues both on top of the plate and underneath the flue plate; I don't know that it is necessary to explain just the peculiarity of the construction of the flue plate.

Ques. 42. The changing of such stove so as to make it a coal stove; did it necessitate the changing of the hearth and doors?

Ans. Yes, sir; to carry off the ashes as they were dumped from the grate it is necessary to have some place to receive them, or they would go out on the floor; all such stoves have a place to receive the ashes that are dumped; they could have been dumped into the lower part of the front of the stove to the ash drawer, but the ash drawer was not convenient in taking up the ashes and carry them away; that putting in of the ash drawer necessitated the
210 raising of the hearth of the stove, which occupied no more room in the house afterward than it did before, and the

raising of the hearth shortened those long front doors in the 1859 stove, but it didn't change the operation of the stove.

Ques. 43. Only to fit it for coal?

Ans. Yes, sir.

Ques. 44. Was there any other difficulty with the flue plate of the old stove which rendered it necessary to put the so-called Keep flue plate in the coal stove?

Ans. Yes, sir; in some sections; there would be no difficulty here, with hard coal, but when you come to burn a soft coal that would make a blaze and run over the end of the flue plate and under the bottom of the oven, and I have known that sheet plate in the 1859 stove to become so hot that it would drop to the bottom, but the peculiar construction of the Keep flue plate left the operation, so far as the stove was concerned, that if it was heated hot it wouldn't drop; I never knew one to drop, anyway; it enlarged the flue and strengthened the plate at the same time.

Ques. 45. Had any previous effort been made by the defendants to remedy the difficulties you have spoken of in using coal in the 1859 stove, and if so what, and with what success?

Ans. They manufactured a stove in 1867, as I recollect, called the "Improved." It looked like the stove, with a dumping grate and an ash drawer under it with a dumping grate, the grate dumping exactly in the ash drawer, and when it was dumped the lower edge of the grate was in the ash drawer, so you dumped the coal and ashes and all into the ash drawer together; what is called the ash box in the 1859 Stewart stove was dropped so as to make room for a drawer perhaps 2½ inches high, or somewhere thereabouts.

Ques. 46. That is on the 1867 stove?

Ans. Yes, in the 1867 stove; that brought the drawer very
211 close to the grate.

Ques. 47. Now state what the effect was.

Ans. We could dump the coal and ashes into that drawer, but if there was any amount of coal and ashes you couldn't turn the grate back and get the drawer out, so they had to be very careful, if they attempted to dump, that there was very little to dump, otherwise they couldn't get the grate back to get the drawer out; it was found not convenient or practical.

Ques. 48. And this difficulty you have spoken of was remedied by the Keep improvements of the 1869 stove?

Ans. Yes, sir; the name of the '67 stove was simply "Improved;" it was a tight ash box, the same as the '59, but it was dropped down so as to get a shallow ash drawer in.

Ques. 49. Was the name of "Stewart" upon this stove at all?

Ans. No, sir.

Ques. 50. Did the sale of those 1867 stoves meet with any particular success, or what was done with the stove?

Ans. It was manufactured and sent out to the trade; there were quite a good many sold; I couldn't tell how many, but I suppose sold for the reason that it looked like the Stewart stove and had a look as though it might make a good coal stove or a wood stove,

and you know once around among the trade if there was only one stove there would be a good many stoves sold.

(Mr. COWEN :)

Ques. 51. Did that 1867 stove have a dumping grate?

Ans. Yes, sir.

Ques. 52. How long did that 1867 stove continue to be manufactured and sold?

Ans. I don't know that I could answer that satisfactorily, but I should say only one issue of it; one edition.

212 (Mr. COWEN :)

Ques. 53. Do you mean by that it was made only one year?

Ans. Yes; only one year.

Ques. 54. Do you know whether those stoves were returned to any extent or not?

Ans. Yes; I know a good many of them were returned for the reason that they were not a success as a coal stove.

Ques. 55. After the 1869 stove was made and put upon the market which contained improvements of Mr. Keep, as spoken of, with what success, if any, did it meet?

Ans. It appeared to satisfy the trade and the parties using it as a coal stove; dealers were largely loud in its praise.

Ques. 56. After the 1869 stove what Stewart cook was next put upon the market, and what was it called?

Ans. It was the 1873 stove, as I recollect, called the same as the 1869, "The Dumping-grate Stewart Cooking Stove."

Ques. 57. What, if any, changes were introduced in the 1873 stove?

Ans. The 1873 had an entirely different grate put in from the 1869; I am not sure whether any other changes were made in the stove; it is possible there was a little change made in the chute plate to make it a little sharper.

Ques. 58. Was it a new design?

Ans. I think there was a new design in 1873 in the bottom of the stove, so they could put on the tin bottom covers of the old stove and have a little more room for the ash pan; the ash-pan part of the bottom of the stove being dropped a little lower than the rest of the bottom of the stove, a couple of inches, or such a matter.

Ques. 59. Did or did not that stove of 1873 contain the Keep improvements of which you have spoken?

213 Ans. Yes, I think that contained all the improvements.

(Mr. COWEN :)

Ques. 60. It was the Keep grate—this short-bar grate—it contained?

Ans. Yes, Keep's dumping grate.

Ques. 61. Mr. Warren, one of the defendants, states in answer to questions 11 and 12, that the 1869 stove had its largest sale in the year 1870, and that such increased sale was due to the adver-

tisements made by Fuller, Warren & Co.; state, if you can, if that accords entirely with the facts as you recollect.

Ans. Without any reference to Mr. Warren's statement, I will state what I should consider to be the facts in the case; the sale was due somewhat, without doubt, to the advertising, which was mainly through the exhibiting of the stove in the houses of the dealers, and the expense of those exhibitions was usually met by the dealers; then, again, its sale would be perhaps more largely due to the fact that it was a stove that had been called for several years which was a dumping-grate coal stove; I should say the increased sale was owing to the fact that it was a coal stove rather than for wood, more than anything else, and the exhibition was to call the attention of people to the fact that there was now a dumping-grate coal stove of the Stewart pattern.

Ques. 62. Did the sales of such stoves, subsequent to the year 1870, decrease for any reason, and if so, state for what reason, if you know?

Ans. I couldn't answer that with certainty; I could give my opinion; at that time other dealers—other manufacturers rather, throughout the State and country, were changing their stoves from wood to coal, so while Fuller & Warren issued a dumping-grate cooking stove there were others issued by manufacturers all over the country, and at the same time ranges were more generally manufactured than they had been, and where other dump-
214 ing grates were sold in ranges it would "cut," as we used to term it, on the sale of the Stewart.

Ques. 63. After the more thorough introduction of ranges, and the manufacture of coal cook stoves by other dealers, the demand for the Stewart stove most naturally decreased to some extent?

Ans. I should judge so from the fact that there were other good coal cooking stoves made.

Ques. 64. You have stated that the 1873 stove contained all the so-called improvements of Mr. Keep; will you state whether or not the Stewart stove of 1873 met with any success in its sales, and if so, to what extent?

Ans. It met with success, but to what extent I could not answer.

Ques. 65. Were you engaged then in the sale and putting into the market the 1873 stove?

Ans. Yes, sir.

Ques. 66. Then can you not state whether it met with a successful sale?

Ans. Yes, we considered our sales good; as the salesmen on the road would say, we felt satisfied with our sales, and thought that our employers were satisfied, too.

Ques. 67. How many Stewart stoves did you sell while you were with the defendants?

Ans. I couldn't answer that.

Ques. 68. Can you state how much in value of Stewart stoves you sold at any time during any year you were so employed?

Ans. The defendants have stated that I sold of the Stewart cook

and parlor stoves $50,000 a year for some years, I don't know how many years.

Ques. 69. The defendant has testified in this case that the sales of the Stewart stove declined after the year 1871; do you understand that to be the fact?

Ans. Not with certainty; I should take their word for it; perhaps that expression "not with certainty" should be "from personal knowledge."

215 Ques. 70. What I intended to inquire of you was whether or not the sale of Stewart stoves declined to any extent after the year 1871?

Ans. I have no personal knowledge as to that.

Ques. 71. Do you mean that you discovered no such decline after 1871?

Ans. After 1873 there was a decline in the general business of the country—in the stove trade as well as other trades; I have understood that the sale of Stewart stoves, as well as all other stoves, declined quite considerably after 1873; there was a panic, you know, throughout the country in 1873; I don't know the month; my impression is it was September, but it may have been October.

Ques. 72. About the year 1873, or after that, was there any other cause for the decline of the sale of the Stewart stove?

Ans. I should say so.

Ques. 73. State it.

Ans. Fuller, Warren & Co. had issued a couple of other stoves, coal cooking stoves, that they were quite interested in the sale of; a good many parties considered those as good as those of the Stewart coal stove, whereas if they hadn't been put upon the market they would undoubtedly have bought the Stewart cooking stove; those stoves were called the "Home Friend" and "Golden Crown."

Ques. 74. Did they also begin the manufacture of a range?

Ans. Yes, about this same time they put upon the market a dumping-grate coal range, portable; it had a fine sale I am told.

Ques. 75. Do you know whether they made any special effort to push the sales of the "Home Friend," and "Golden Crown," and the range?

Ans. So far as being a salesman on the road was concerned, I judged Fuller, Warren & Co. were quite as much interested in the sale of the "Home Friend" and "Golden Crown" as in the

216 Stewart cook; in fact, we were instructed to take special pains to sell them, and they would bear out taking special pains, as they were a good, first-class stove.

Ques. 76. Will you please state what effect upon the sale of the Stewart stove the Keep improvements had after they were introduced into the Stewart stove?

Ans. The effect was to increase the sale, because it made the stove just what was called for by the trade and by parties in the kitchen using cooking stoves; the wood of the country had become largely exhausted and the price large, and the demand was for a stove that they could use with a cheaper fuel and more convenient, which was coal.

Ques. 77. What position, or rank, did the Stewart stove of 1869 take in the market?

Ans. First class.

Ques. 78. Was it then the leading cook coal stove?

Ans. Yes, sir.

Ques. 79. And, subsequent to that, did other manufacturers introduce good coal cook stoves and ranges?

Ans. That's been answered before.

Ques. 80. Now, to what extent, if any, were the Stewart stoves returned on account of being inoperative, or for any other reason?

Ans. I have no knowledge of the Stewart stove being returned from any imperfections, or failure to do its work.

Ques. 81. Is it a fact that they were inoperative?

Ans. Do you mean in the kitchens?

Ques. 82. Yes.

Ans. I never knew of any such thing; sometimes parties in kitchens needed instructing in the use of that stove, as they would in the most simple stove that could be made.

Ques. 83. Was there any demand for second-hand Stewart stoves in the market?

217 Ans. Yes, sir, and somewhat to the present day, but not so largely as along in 1869 through to 1880; so far as my observation goes I should say the demand along through from 1873 to 1880 for second-hand Stewart stoves was larger than the supply.

Ques. 84. How many different kinds of stoves do you know of the Keep grate being used in, and you may state them, if you know?

Ans. It is used in all the kinds of the Stewart D. G. stove, but I am not sure whether Mr. Keep used it in his "Rubicon" range, but I think he did; I wouldn't swear to that; I know it would fit the "Rubicon" stove.

Ques. 85. Was it used in the "Director" stove?

Ans. I am not aware it was; it could have been used in the "Director" with a different frame.

Ques. 86. In how many different kinds of stoves, could the Keep grate be used, if you know?

Ans. All of the Stewart D. G. pattern and Mr. Keep's range, and the "Director" stove certain.

Ques. 87. Could it be used in various other stoves by changing the frame?

Ans. I don't see why it couldn't be used just as readily in other stoves as in those; it is something I never had my attention called to; I should see no difficulty in the way.

Ques. 88. Did the use of the Keep grate in the Stewart stove affect the selling value of the stove?

Ans. It couldn't been otherwise, for it made a coal stove of it instead of a wood stove; the coal stove was what the market demanded.

Ques. 89. Did it tend to decrease the selling value of the stove, or otherwise?

Ans. It tended to increase the selling value of the stove.

Ques. 90. How was the introduction of the Keep grate into the Stewart stove received and regarded by the trade?

Ans. Favorably.

218 Ques. 91. After the introduction of the Keep grate into the various stoves you have spoken of what grate was understood to be ordered for the cook stove, whether it was the Keep grate or some other grate?

Ans. I used to order it myself as the D. G. grate, or the dumping grate.

Ques. 92. Then how was the Keep grate designated in the order?

Ans. Designated in my orders and in my instructions to the agents as the D. G., or dumping grate.

Ques. 93. And the Hathaway or long-bar grate was designated how in giving the orders?

Ans. I used to designate that as the two-bar grate.

Ques. 94. What grate was referred to by the figures "1869" and "1873"?

Ans. 1869 was that long or two bar or Hathaway grate; that was the grate made in 1869; the D. G. grate was not issued until 1873; so you speak of the 1869 and it couldn't mean the D. G.

Ques. 95. 1873 then referred to the D. G. or Keep grate?

Ans. Yes, sir; I don't know that anybody else ever designated it "two-bar" grate, but I used to so designate them, and I suppose if I sent in that order they would know what I meant; I think the official designation would be "1869" grate.

Ques. 96. While you were engaged with the defendants were you to any extent acquainted with stoves made by other manufacturers?

Ans. I was quite familiarly acquainted with the construction of other stoves; we considered it rather an essential on the road to be able to tell dealers about other stoves as well as our own in order to meet objections sometimes.

Ques. 97. Mr. McLeod, in his testimony, speaks of the "offset bottom and the diamond opening damper" of Mr. Keep; do you know what they are?

219 Ans. Yes, sir.

Ques. 98. Were those devices in the stoves of 1869 and 1873?

Ans. They were in the 1873.

Ques. 99. Are you familiar with their construction and operation in the stoves?

Ans. Yes, sir.

Ques. 100. What effect did the offset bottom and the diamond opening damper of Mr. Keep have upon the selling value of the stove, whether to increase or decrease it?

Ans. The question in reference to the bottom has been answered previously; the damper was a convenience, and any convenience would add to the selling value of the stove; the convenience of it was that you could shut it down very low and have some draft.

Ques. 101. Mr. McLeod states that he used the raised hearth in a stove which they constructed and sold about the same time that it

was used in the Stewart stove. Were you acquainted with that stove of Mr. McLeod?

Ans. Somewhat; I presume they used it; they were great retailers—they used to be.

Ques. 102. Were you acquainted with what was known as the "Hawkes auxiliary air chamber"?

Ans. Yes, sir; a spiritual stove.

Ques. 103. Now, in what respects did the devices which Mr. McLeod speaks of having used in that stove resemble the raised hearth and doors of Mr. Keep?

Ans. From the fact that hot-air auxiliary air chamber was a box on top of a hearth and the raised place in the Stewart stove was on top of the hearth of the old stove; there was a certain kind of resemblance between the two.

Ques. 104. Were they the same in operation or construction?

220 Ans. Not in construction, but really the operation between the two would be about the same thing.

Ques. 105. Mr. Mann, in answer to question 76, states that the raised hearth of Mr. Keep put in the stove of 1869 was an air chamber on the top of the hearth. Is that so?

Ans. It is an air chamber as well as an ash pit.

Ques. 106. On top of the hearth, I mean.

Ans. No, not on top of the hearth; it is on top of where the old hearth would be.

Ques. 107. But the hearth in the stove was on top of the ash pit?

Ans. Yes, always.

Ques. 108. Did you ever hear any complaint from customers that the stoves containing the Keep improvements would not burn coal?

Ans. No, sir.

Ques. 109. Please describe the ash pan of Mr. Keep.

Ans. It was made of good, heavy sheet iron and a wire in the top; malleable-iron bails.

Ques. 110. How did that differ from the ash pan then in use, if at all?

Ans. I don't know that there were any ash pans made of sheet iron previous to that.

Ques. 111. What objection, if any, was made by customers to this ash pan in its use?

Ans. I don't know that I ever heard any objection made to it.

Ques. 112. Ever hear any objections made by people as to the bail?

Ans. No, I don't know that I have heard any objections offered to that bail.

Ques. 113. How was the bail of the ash pan then made in use?

Ans. Dropped down inside the pan.

Ques. 114. What advantage had the Keep bail, if any, over the bail of the ash pans then in use?

221 Ans. It was outside of the ashes, and it wouldn't get so hot, and you could lift it with the lifter without touching your hands to it to take it out.

Ques. 115. The design of the stove described in letters patent, design No. 8685—can you state what, if any, effect it had upon the selling value of the Stewart stove?

Ans. The design of the stove was pleasing, which would certainly go so far towards making it a saleable stove.

Ques. 116. State, if you can, how long the "Golden Crown" and "Home Friend" continued on the market?

Ans. I should say there was hardly more than one edition of those issued; they were a good, first-class stove, but they didn't have really what we would call "a run."

Ques. 117. Did they run out of the market before the Stewart stove?

Ans. The Stewart stove does not run out of the market yet; I don't know that they are manufacturing it, but it is called for today?

Ques. 117½. How is it with the "Golden Crown" and "Home Friend"?

Ans. I think you will find it difficult to find many dealers who would remember the "Golden Crown."

Ques. 118. State what advantage, if any, the Keep grate had over the grates used by the defendants prior to its introduction into the stoves?

Ans. You mean what advantage the D. G. grate had over the 1869 grate?

Ques. 119. Had over the coal grates used prior to its introduction?

Ans. It would clear the fire of ashes much more readily than any grate that preceded it; it would last longer than any of the grates that preceded it with a coal fire.

Recess to 2 p. m.

222 Ques. 120. I see that Mr. Warren in his testimony in answer to questions 205 and 206, says that the Keep grate gave the cross-bars somewhat more of a vertical motion than the long-bar grate, and gave the cross-bars in addition to the horizontal vibration a slight vertical one; and question 205 was, "In what respect was the grate invented by Mr. Keep altered from the long-bar Stewart grate?" Will you please state what, if any, similarity exists between the two grates, or if the Keep grate is altered from the long-bar Stewart grate?

Ans. They are two distinct and different grates; one grate is not made from the other; they are two different constructions of grate entirely.

Ques. 121. What do you understand by the cross-bars having a somewhat vertical motion that Mr. Warren speaks of?

Ans. I don't understand you.

Ques. 122. Is there any difference in the vertical motion of the long-bar grate or the Keep grate?

Ans. I don't know of any.

Ques. 123. Is there any vertical motion to the grates when they are moved in a horizontal direction?

Ans. I don't know of any.

Ques. 124. They both have a vertical motion when they are dumped?

Ans. Oh, they both dump.

Ques. 125. And then the bars are in a vertical position?

Ans. Yes, sir; but the "shaking" and the "dumping" are two different things.

Ques. 126. While engaged for the defendants did you sell the Keep grate independently of the stove, and if so to what extent?

Ans. Why, I have sold grates to the trade independently of sales of stoves; how many grates I have sold I don't know; and
223 I don't know as anybody can tell; but as compared with the stoves I should say more grates were sold than stoves.

Ques. 127. In making such sales of stoves and grates during the time you were with the defendants were you furnished with a price-list which you used?

Ans. Yes, sir.

Ques. 128. Have you now any such price-list?

Ans. I think I have.

Ques. 129. Will you produce it if you have?

Ans. (Producing same.) Here is their trade price-list, wholesale price-list, of the Stewart stoves and fixtures in April, 1875.

Ques. 130. I see on this price-list there are several grates named; I want to know if there is anything upon this price-list which indicates the long-bar grate?

Ans. I don't find it; the nearest I come to it is the 1873 grate for the 1869 stove.

Ques. 131. What grate is there referred to?

Ans. The D. G. grate is referred to; the 1873 grate for the 1869 stove is the D. G. grate; it is the Keep grate.

Ques. 132. You find nothing upon this list indicating the 1869 or long-bar grate?

Defendants object as immaterial. Overruled.

Ans. No, sir.

Ques. 133. Did you ever have or see any price-list of the defendants giving a price for or advertising the old grate of 1869 known as the long-bar grate?

Ans. I couldn't say whether I did or not; I have no recollection of seeing it.

Ques. 134. In making sales of grates and stoves was the long-bar grate advertised or pushed upon the market, and if not please state why not, if you know?

224 Ans. It was not pushed after a little from the fact that there was faults, serious ones, with the grate; the 1869 grate I refer to.

Ques. 135. Did the faults in this grate detract from the selling value of the stove?

Ans. I should say it must have detracted from the sales of the stove after it had been tried, from the fact that the grate proved not to be a success.

Ques. 136. In giving the prices to customers what, if any, deductions were given off from this price-list?

Ans. We were not allowed to vary from that list; I am not sure but what that list says, "five per cent. discount, 30 days;" we sold according to that list.

Ques. 137. Except it might have been five per cent. off for cash?

Ans. Yes, sir; if so stated there; we were not allowed to vary from the wholesale list.

Complainant's counsel offered the price-list in evidence, to which defendants' counsel objects—

(1.) That it does not appear that the parties who issued it are the defendants in this action.

(2.) That it is dated three years prior to the term for which this accounting is had, and has no relevancy to the time of the accounting.

(3.) As immaterial because there is no proof that any goods were sold in accordance with this price-list; the price-list itself does not prove it.

Objections overruled. Defendants' counsel excepts.

Price-list received and marked, "Complainant's Exhibit Defendants' Price List, 1875."

Ques. 138. The price-list issued as this was issued, or pur-
225 ports to be issued, April 1, 1875, was the price of stoves sold or delivered when, in that or some other year?

Ans. The probability is that some would be delivered in 1875, and probably the bulk, and perhaps some would pass beyond January 1, 1875, and be delivered in 1876.

Ques. 139. Do you find anything in that exhibit indicating a price of the Keep grate, and if so state it.

Ans. "Coal grates, 1873," (that means the D. G. grate or Keep grate) it says. Then, again, it says "1873 coal-grates for 1869 Stewart stoves;" that is the same grate, and it gives the same price; there is nothing more that refers to the Keep grate.

Ques. 140. Did you ever hear of any reductions being made from the price-list by these defendants so long as you were so employed by them other than the 5 per cent. for cash and thirty days?

Ans. Nothing, unless it was something special for a special purpose or a special occasion.

Ques. 141. Did you ever hear of anything of that kind in connection with the Keep grate?

Ans. No, I don't know that I ever did; or any other grate.

Ques. 142. Did you ever hear or have any such claim made from any customers of the concern?

Ans. I don't know that I ever did.

Cross-examined by Mr. COWEN:

X Ques. 143. Is this "Defendants' Exhibit Long-bar Grate, 1869 Grate," what you have spoken of as the "Hathaway grate"?

Ans. Yes, sir; I called it the two-bar, or long-bar, or Hathaway grate.

X Q. 144. That was a dumping grate, wasn't it?

Ans. Yes, sir.

X Ques. 145. Were there in use prior to the change made
226 on the Stewart stove to adapt it to burn coal better, other cook stoves in which the ashes from beneath the grate were carried down over an incline to the ash pit and the hearth?

Ans. I should say there were.

X Ques. 146. During what years were you salesman for Fuller, Warren & Co.?

Ans. As I recollect, I was on the road every year that I was with them, more or less; I think with Fuller, Warren & Co. from 1862 for 14 years.

X Ques. 147. You were only with them 15 years?

Ans. There might be considered a little error saying 15 years, for one of those years I was under the direction of P. P. Stewart.

X Ques. 148. When you left the business in 1876 were there other coal cook stoves put upon the market by Fuller & Warren and other manufacturers?

Ans. Yes, sir.

X Ques. 149. And selling side by side with the Stewart cook?

Ans. Yes, sir.

X Ques. 150. And that competition had a tendency to lower prices, did it not?

Ans I don't know that it did.

X Ques. 151. It didn't tend to cut prices?

Ans. I couldn't say it cut prices, but it tended to reduce the sales of any particular stove.

X Ques. 152. But competition would not affect prices?

Ans. I should say upon that point that it would with first-class stoves.

X Ques. 153. When did Fuller, Warren & Co. commence making the "Home Friend" and "Golden Crown"?

Ans. I couldn't answer that definitely.

X Ques. 154. State as near as you can tell.

Ans. I should say somewheres about 1869 or 1870; that is presumed.

X Ques. 155. At least as early as 1871?

227 Ans. I should presume so; I am not decided upon that definitely.

X Ques. 156. For several years before you left?

Ans. Oh, yes.

X Ques. 157. Those were good stoves?

Ans. Yes, sir.

X Ques. 158. Sold readily in the market?

Ans. Yes, sir.

X Ques. 159. First-class stoves?

Ans. Yes, sir.

X Ques. 160. They were coal cook stoves?

Ans. Yes, sir.

X Ques. 161. Did either of those stoves contain what you call Keep improvements?

Ans. No, I couldn't say they contained the Keep improvements, for the Keep improvements were put upon the Stewart stove.

X Ques. 162. They had dumping grates?

Ans. Yes, sir.

X Ques. 163. What kind?

Ans. I don't recollect as to that now.

X Ques. 164. They had dumping grates for burning coal?

Ans. Yes, sir.

X Ques. 165. Did they have this grate? (Indicating a long-bar grate.)

Ans. I couldn't say as to the grate.

X Ques. 166. But you know they had a dumping-coal grate?

Ans. Yes, sir.

X Ques. 167. They had a hearth and an ash pit formed so that the ashes from the grate would dump into it?

Ans. Yes, sir.

X Ques. 168. What kind of an ash pan did they have?

Ans. I may not answer that correctly; but if I recollect correctly it was a cast-iron ash pan.

X Ques. 169. With a bail?

228 Ans. I couldn't say as to that; it was so short a time that I had to do with that stove and so long ago that I have taken no pains to refresh my memory upon these points.

X Ques. 170. They didn't have the Keep bottom flues?

Ans. No; they were entirely different from the Keep flue.

X Ques. 171. And they didn't have the Keep damper?

Ans. I should say not.

X Ques. 172. And of course the design was not the same as the Keep design for the Stewart stove?

Ans. No, sir; it was different.

X Ques. 173. You say that when you ordered the Keep grate you generally ordered a D. G. grate?

Ans. Yes, sir.

X Ques. 174. And when you ordered this long bar you ordered the two-bar grate?

Ans. Yes, sir; my memory of that is that I called it the two-bar grate.

X Ques. 175. You don't know how the defendants designated it on their books?

Ans. I think they called it the 1869 grate, as I remarked this forenoon.

X Ques. 176. You don't know, you are not one of the book-keepers?

Ans. No, sir.

X Ques. 177. Then you don't know how they designated these grates on their books of your own personal knowledge?

Ans. No, sir.

X Ques. 178. Did I understand you to say that a portion of the raised hearth of Keep was the same as the Hawkes auxiliary air chamber, or about the same?

Ans. I said in the construction they were different, but the
229 operation was about the same thing; the Hawkes auxiliary air chamber was made to warm or heat the air.

X Ques. 179. That was one object of the raised hearth?

Ans. No, sir, but it did do that; it warmed or heated the air; I don't consider that either amounted to any benefit to the stove, as I remarked this morning.

X Ques. 180. So far as the Hawkes air chamber or this raised hearth heated the air going into the fire chamber, you don't consider either was any benefit?

Ans. No, sir, a damage rather than a benefit.

X Ques. 181. What kind of bail was used in other kinds of ash pans that were used?

Ans. So far as my recollection goes they were a wire bail; perhaps about quarter-inch wire, possibly a little smaller.

X Ques. 182. Fastened at the ends and turned down on the front of the ash pan?

Ans. So far as my recollection goes that was about the style.

X Ques. 183. Fastened to the ends of the ash pan and turned down on the front side?

Ans. Yes, sir.

X Ques. 184. Was a bailed ash pan of that kind used in the Stewart cook stove of 1869?

Ans. I should say no.

X Ques. 185. Was it used in the Stewart stove at any time?

Ans. I should say not; I don't have any recollection of it.

X Ques. 186. How did the price of the Stewart stove compare with the price of the "Home Friend" and "Golden Crown" after they were put into the market?

Ans. I couldn't answer that, because I don't recollect.

230 Redirect examination.

By Mr. DAVENPORT:

Ques. 187. I think I understood you to say on your direct examination that the raised hearth and doors of Mr. Keep were an advantage to the stove?

Ans. I don't recollect whether you so understood me or not, but I should so consider it.

Ques. 188. Do you now say on cross-examination that the raised hearth and doors, as well as the auxiliary air chamber, was rather a detriment than an advantage to the stove; do I so understand you to have stated on the cross-examination?

Ans. No.

Ques. 189. You referred simply to the heating of the air?

Ans. Yes, sir; there is more fuel in cold air than in warm air; it is the air that makes the fire burn, and as quick as you begin to take warm air you expand it and make more air; it is the same as taking a pail of water and warming it to make four; the more cold air you have the more fuel you have.

Ques. 190. Therefore, in your opinion, the cold air is better for the fire than the heated air?

Ans. Yes, exactly.

Ques. 191. For the reason that heating the air before it enters the fire-box is a detriment rather than an advantage?

Ans. Yes, sir; it makes less fuel than the same quantity of cold air.

Ques. 192. Did this device (the raised hearth and doors) of Mr. Keep tend to increase the heat of the air before it entered the fire-box beyond the old Stewart stove?

Ans. I don't know as it did, for that passed through the chamber before it got to the grate.

Ques. 193. I think you have stated that the office of this raised hearth and doors was not to heat the air?

231 Ans. No, sir; I never supposed that was taken into consideration.

Ques. 194. What do you understand was its purpose?

Ans. So as to get a place for the ashes and ash drawer; but, at the same time they got a splendid place for the woman in the kitchen to put things to keep them warm on top of that ash pit.

Ques. 195. You think the raised hearth and doors were an advantage to the stove?

Ans. Yes, sir.

WILLIAM J. KEEP resumed upon the direct examination.

Examined by Mr. DAVENPORT:

Ques. 142. In answer to direct question 139 the record shows that you stated that "the Gardner grate would fit that stove," meaning the 1869 or 1873 stove; is that statement correct?

Ans. The Gardner grate would not fit these stoves.

Ques. 143. Also, in answers 140 and 141 the record shows you stated in substance that the Gardner grate could be used where the Keep grate was used; please state about that?

Ans. It was an erroneous statement; they would not fit.

Ques. 144. Mr. Warren, in his testimony, states that the increased sale of the stove in 1870 was due to advertisement made by Fuller, Warren & Co.; will you please state, if you know, to what the increased sale was really due?

Ans. The increased sale was due to the improvements solely, or almost so; the trade had been asking for four or five years to have a dumping grate put into the Stewart stove, and when it

232 came out they were pleased with it; other than those considerations, there were exhibitions made at fairs during that year.

Mr. COWEN: I object to that portion of the answer which states what the trade demanded, as incompetent and hearsay.

Ques. 145. In answer to question 13 Mr. Warren states that the effect of the introduction of these improvements (meaning the Keep improvements, I assume) "upon that stove the second year after that, or the succeeding years, very materially reduced the sale of the stoves;" please state what effect the introduction of these improvements upon the stove had the second year after that, or the succeeding years, if you know?

Ans. The Stewart stove, as made before these improvements, had, practically, no sale after the year 1869, and if it had not been for these improvements there would have been no Stewart stoves sold; therefore, what were sold were due to the improvements, and the decrease was not due to the improvements.

Ques. 146. In answer to question 20 Mr. Warren states that the effect of those improvements in the years 1872 and 1873 was to decrease the sale; what is the fact in that respect as you understand it?

Ans. There were a large number of causes that caused the decrease of the sale of the Stewart stoves; after about the year 1869 there was very great competition; every manufacturer, almost without exception, made a first-class dumping-grate coal stove, and each exerted himself to sell his own stoves; the defendants made a stove at this time called the "Home Friend," afterward changed to the "Golden Crown," and they pushed this stove; the sale of ranges commenced about the same time; all these causes decreased the sale of this stove.

233 Ques. 147. Mr. Warren states in answer to question 21 that he knows sales were decreased in the years 1872 and 1873 from the amount of goods manufactured and sold and the royalties paid; do you know to whom the defendants paid such royalties, and if so, state to whom?

Ans. To the Stewart estate.

Ques. 148. Mr. Warren makes a statement as to a certain number of stoves containing the Keep improvements being returned, and states that in 1872 166 stoves were returned; do you know how many were returned each year containing your improvements after 1871, and if so state how many?

Ans. I can state; they are as follows:

"1872, 80 were returned instead of 166.

"1873, 17 were returned instead of 94.

"1874, 18 were returned instead of 74.

"1875, 11 stoves were returned instead of 52.

"1876, four were returned.

"1877, 20 were returned.

"1878, 20 were returned."

I have no record after that.

Ques. 149. If those were Stewart stoves containing your improvements, as stated by Mr. Warren, would any report be made on them, and if so to whom?

Ans. If they were Stewart stoves of any kind (whether with or without Keep's improvements) they would have been made from year to year to the Stewart estate, and they were so made.

Ques. 150. In those statements presented did the number of stoves returned appear?

Defendants' counsel objects on the ground that the statements themselves are the best evidence of what they contain. Objections overruled. Defendants *accepts*.

Ques. 151. Have you seen those statements?

Ans. I have.

234 Ques. 152. In whose possession did you last see them, or do you know where they are?

Ans. They were in Mrs. Stewart's possession the last time I saw them.

Further hearing adjourned to the following day.

TROY, N. Y., *September 16th*, 1886.

The parties met at 10 a. m.

Present as before.

The complainant's counsel calls upon the defendants to produce the reports made to the Stewart estate, either the original reports or the books and memoranda from which said reports were made. Defendants' counsel states that he will produce the reports if possible.

WILLIAM J. KEEP resumed on the direct examination.

Examined by Mr. DAVENPORT:

Ques. 153. Who represents the Stewart estate?

Ans. Mrs. P. P. Stewart is the executrix of the will of P. P. Stewart.

Ques. 154. Has she the custody of the reports presented by the defendants as to the sales and returns of the stove?

Ans. She had when I was here two years ago, and I re-examined them at that time and checked my account from it.

Ques. 155. Have you tried to find Mrs. Stewart for the purpose of this examination?

Ans. Yes, I went to see her as soon as I came to town.

Ques. 156. Where did you learn she is?

Ans. She is in Pittsford, Vt.

235 Ques. 157. You have already stated the number of stoves returned between 1871 and 1879; can you state what kind of stoves those were which were returned, and if so, please state?

Ans. There were a few of them of the 1869, and, perhaps, some of the 1873, although I never saw any, but these stoves, as soon as they were received at the store, were at once sold again, as there was always a demand for these stoves. The most of these stoves were 1859 stoves, which were taken in exchange for the D. G. stoves. There was also a lively demand for these second-hand stoves, and

they were sold at the store as fast as received, or nearly so. The stoves with my improvements in sold at the wholesale price, the same as sold to dealers. That was the custom of the firm. The old 1859 stove having been taken in exchange for some new stoves, either Keep's or some other one, was sold generally at the uniform price of $20.

Ques. 158. In answer to cross-question 84 of Mr. Warren's testimony he states in substance that the customers stated that the stoves would not burn coal, and they had to send them back. State, if you can, to what stoves that must have referred?

Ans. This was the reason for returning the 1859 stove, if it had been sold for coal, but it more especially applied to the imitation, or improved stove of 1867, made by the defendants. In 1867 there were quite a number of these improved stoves made, and a large portion of these stoves were returned, and were fixed over from time to time and sold again, and then taken back, and it was said that they would not burn coal even as well as the 1859 stove.

Ques. 159. Were these Stewart stoves of 1869 or 1873 in any respect inoperative?

Ans. No more than any first-class stove. There are cases where any stove will not satisfy the people who use it, and it is sometimes cheaper to take it back than it is to have any fuss with them. This accounts for good stoves coming back occasionally, but they are all sold again at once. The stove never was inoperative.

236 Ques. 160. Were such stoves ever inoperative?

Ans. They never were inoperative.

Ques. 161. Mr. Warren in answer to cross-questions 111, 112 and 116 states that some of the stoves might have been broken up. Can you state what stoves those were that were broken up, if any were broken up, and why, if you can state?

Ans. Those stoves that were broken up must have been either the 1867 or 1859 stoves, which were too much used up to repair. The reason that I know that they could not have been the 1869 and the 1873 stove is that there is still at this day a demand for those stoves, although it is understood they are not manufactured, and there has always been such a demand for these stoves.

Ques. 162. State to what extent, if you can, the demand was for second-hand stoves of 1869 and 1873?

Ans. The only way I can answer this question is to say that there were never more than one or two at the store at once, and these second-hand stoves were kept at the store. I often wanted a stove of this character to experiment with, and as a general thing I had to use a new stove. This was the case the last few months of 1875, when I left the firm, when I wanted to use five stoves at the same time and had to use new stoves.

Ques. 163. In answer to question 12 of Mr. McLeod's testimony he states that he experimented on a stove of his manufacture with the raised hearth and doors about the same time they were used in defendants' stove. Can you state what those stoves were that Mr. McLeod experimented with; and if so state?

Ans. It was a first-class coal stove, made by Bussey & McLeod, called the "Cosmopolitan."

Ques. 164. If you know, state the similarity or difference, if any, between the raised hearth and doors on the "Cosmopolitan" and on the "Stewart" stove?

237 Ans. The main hearth, which was above the ash pan in the "Cosmopolitan," would have corresponded with the hearth in the Stewart, but what he speaks of as a raised hearth that he experimented with was an auxiliary hearth above this for the purpose of making a hot-air chamber, while the Stewart hearth was simply the cover of the ash pit.

Ques. 165. In answer to question 26 of Mr. Mann's testimony, he states that the raised hearth in the Stewart 1869 stove was an air chamber on top of the hearth; please state whether that statement is correct?

Ans. It is not; there was only one hearth on the Stewart stove and no air chamber on top of it; the air chamber or ash pit was under the hearth.

(Mr. COWEN:)

Ques. 166. You mean that the ash pit was substantially made higher than it was before?

Ans. There never was any ash pit before; just simply the bottom run right out; now in this stove they put an ash pit in; they raised the hearth about eight inches higher than it was before; I will explain it further—the old Stewart stove had a small ash pit immediately under the grate hanging in the oven; the new Stewart stove of 1869 had the ash pit in front of the flue and partially below the oven bottom and in front of the bottom; this ash pit was covered on top with what we call the raised hearth in this case, and the bottom of the stove was sunk down and brought forward to make the bottom of the ash pit; the chamber under the grate was connected with this ash pit by an inclined plate to convey the ashes to the ash pan from the grate.

Ques. 167. In answer to question 9 of Mr. McLeod's testimony he states that the flue plate of the complainant in the Stewart stove interfered with the draft of the stove; state, if you can, if such was the fact?

Ans. The fact was that this flue plate made the flues twice
238 as large at the rear end, where there would be any clogging, than they were before, and thus it nearly doubled the draft of the stove instead of decreasing it.

Ques. 168. Was the ash pan of the complainant introduced in the Stewart stove of 1869 and 1873, sold independently of the stove by the defendants?

Ans. It was.

Ques. 169. Mr. Warren in his testimony, in answer to question 50, states that the ash pan sold for about 20 cents, handle and all; state whether or not you have found on the defendants' books any entries of the sales of ash pans independent of the stove, and if so, state at what price?

Ans. I did come across such entries on the sales book; one of November 26, 1879, Kenyon & Co., Oswego, one 9 I. C. Stewart ash pan, charged to him at $1.00; another entry of J. D. Battersee, Chester, Mass., one 4½ ash pan, $1.00; I have not got the date of the second sale; the letters "I. C." mean in this case "ironclad," referring to the reservoir, and it was an 1873 stove, because this stove was the only one that had the ironclad reservoir on it.

Ques. 170. In answer to question 54 of Mr. Warren's testimony he states that this ash pan was a detriment to the stove; please state, if you can, whether that be the fact, and if not, why not?

Ans. It was not a detriment to the stove, but a great advantage; at the time this pan was made sheet-iron ash pans had not been used to any extent, if at all, and the defects in a sheet-iron ash pan that were pointed out at the time were, that it would have no strength as compared with cast iron, and, to make the ash pan strong, the piece running from side to side was added and the bail attached to this in such a way that it is entirely out of the ashes, and is so thin that no ashes can lie upon it, and its position is at the furthest point away from the fire, directly in front of the ash pit, where the
239 air entering the damper passes over it and keeps it cool; again, in emptying this pan, one end being entirely clear, when the pan was raised with that end down the ashes would be discharged without as much dust as though a bail had been added of the kind that is now ordinarily used.

Ques. 171. In Mr. Warren's testimony it is stated by him that the cost of iron varied during the years between January 1, 1876, and January 1, 1882; have you seen his statement of such variations, and if so, state, if you can, what difference such variations would make in the cost of the grate?

Ans. I have seen his statement; this variation would make about a quarter of a cent a pound difference, and as the average weight of the grate was about 14 pounds it would make about 3½ cents difference in the cost.

Ques. 172. Between January 1, 1876, and January 1, 1882, were you engaged in the stove business, and having made a great many castings for stoves, including grates, and if so, state the cost of such casting, including grate castings?

Defendants' counsel objects to the question, claiming that witness should be confined to the cost to the defendants and not what the general cost of such castings was. Objection overruled. Defendants except.

Ans. I had grates made which were made from the same patterns as the Keep grates made by the defendants during said time between 1876 and 1882, and I based my calculation on the prices that I paid during those years, which prices included the manufacturer's profit, and which price I have heretofore stated.

Ques. 173. In the manufacture of stoves by the defendants, while you were engaged with the defendants, did you ever give
240 any directions to the defendants as to what kind of stoves they should manufacture?

Ans. No, I never did, and I had no right to; my business with Fuller, Warren & Co. was to provide what patterns were needed, and the Stewart stoves were to be made under my supervision and to my satisfaction; they had in their possession the patterns for the 1859 stove without my improvements, and for all the stoves with my improvements; they never asked my advice or direction as to what they should make; that depended entirely upon the orders they received, but when they did make any Stewart stoves they were made under my supervision and to my satisfaction.

Ques. 174. Mr. Warren stated that the defendants had no book to his knowledge showing the cost of the stove and various parts of the stoves manufactured by the defendants; state whether the defendants kept such a book or not, and whether you ever saw such a book?

Ans. They did keep such a book, and I have seen it.

Ques. 175. State under whose direction it was kept?

Ans. This book was kept by Mr. Hazzard; he was an employee in Fuller, Warren & Co.'s office, and after his death it remained in the store; this book contained the detailed cost of almost everything that Fuller, Warren & Co. made.

Ques. 176. Have you ever heard any of the defendants refer to this book, or speak of it?

Ans. I have; I have heard Mr. Wells refer to it often.

Ques. 177. State, if you can, when the manufacture of the 1859 was discontinued by the defendants.

Ans. It was discontinued in 1869, and they had quite a
241 large stock of them on hand when the 1869 stove came out, and it was not until very late years that this stock was exhausted.

Complainant's counsel asks the defendants' counsel to produce the various price-lists of stoves and their various parts, and also of grates used by the defendants and by their salesmen between January 1, 1876, and January 1, 1882.

Ques. 178. In answer to question 205 of Mr. Warren's testimony he states that the cross-bars of the Keep grate have somewhat more of a vertical motion than the long-bar grate, and the question assumes that the Keep grate was altered from a long-bar Stewart grate; please state what the facts are in relation to it.

Ans. The Keep grate was not altered from the long-bar grate; it was a new construction, and it didn't give the cross-bars any more of a vertical motion than the other had; neither had a vertical motion except when being dumped, and then they turned almost half over.

Ques. 179. Since the examination of the books of the defendants by Mr. Drake in connection with the statement made by the complainant of the number of grates manufactured and sold by the defendants between January 1, 1876, and January 1, 1882, which statement is referred to in question — of Mr. Keep's testimony, and on which exhibit he marked as he states in pencil "not found" or "erased," have you re-examined the defendants' books and such

statement in connection with the erasures and marks "not found" made by Mr. Drake, and if so you may state what changes, if any, should be made in the complainant's said statement as to the number of said grates appearing on the books of the defendant.

Ans. I have re-examined the defendants' books for the purpose of verifying Mr. Drake's memoranda, and I have marked on
242 such exhibit with a blue pencil (Mr. Drake's mark being in an ordinary black-lead pencil) the facts as I find them; I have marked where he marked "error" where I find his mark of "error" was correct; I have also marked "error" in blue pencil; where I have succeeded in finding the items that he has marked "error," or couldn't find, I have marked them as correct and have given the pages of the book where I found them; I have also added into the account the number of grates which Mr. Drake has added in addition to the number which I found myself; when I take the number of errors and subtract or add the additions which Mr. Drake has made to the account and foot it up I find a difference of 156 grates in favor of the defendants.

Ques. 180. That is you find 156 less grates than are aggregated in the original statement?

Ans. Yes; 156 grates less than I have aggregated in my original statement.

Cross-examined.

By Mr. COWEN:

X Ques. 181. Mr. Keep, when did you quit the employ of the defendants?

Ans. December 31, 1875.

X Ques. 182. Where have you been in business since?

Ans. Six years in the city of Troy, and for the past two and a half years in the city of Detroit, Michigan.

X Ques. 183. Since December 31st, 1875, you have had no special acquaintance with the defendants' business, have you?

Ans. Except what I gained from the books and from my contact with their customers, as I was on the road to sell my own goods.

X Ques. 184. Since December 31, 1875, you have had no
243 occasion or opportunity to examine the defendants' books until they were placed in your hands in this accounting, have you?

Ans. No, sir; I have not.

X Ques. 185. And have you been inside of the defendants' works since that time to any extent?

Ans. Not very often.

X Ques. 186. Occasionally?

Ans. Yes, sir.

X Ques. 187. You stated on your redirect examination that the letters "D. G. S. grates" as applied to grates when found on the defendants' books meant the Keep grate of 1873, how do you know that those letters invariably referred to the Keep grate?

Ans. Because I know that is the name that the Keep grate was designated by by the firm.

X Ques. 188. The letters mean the dumping Stewart grate, don't they?

Ans. They mean that the grate was a dumping Stewart grate; that was the name of the grate used by the defendants in sending out grates.

X Ques. 189. The letters "D. G." mean dumping?

Ans. "D" is the first letter of the word "dumping," and "G" is the first letter of the word "grate."

X Ques. 190. Do you think "D" means dumping, "G" means grate and "S" means Stewart?

Ans. Yes, sir; all taken together it was the name of that individual grate.

X Ques. 191. You weren't the book-keeper of the defendants?

Ans. I was not.

X Ques. 192. And if the book-keeper of the defendants in entering an order meant by the letters "D. G." to designate another dumping grate than the "Keep grate of 1873," he had a right to do it, hadn't he?

244 Ans. I don't think the firm would have allowed him to do it; it would have mixed their business up if he had.

X Ques. 193. If the book-keeper of the defendants say that by the letters "D. G. S." he meant another grate than the Keep grate can you deny it?

Ans. I should deny it.

X Ques. 194. You know what he meant better than he knows himself—is that so?

Ans. I don't think he would deny it in that way.

X Ques. 195. That is not the question; suppose he should state it?

Ans. I know what that meant; that is all there was of it.

X Ques. 196. You know what you think it meant?

Ans. I know this thing, that a grate ordered as a D. G. grate for a Stewart stove would always bring a Keep grate; I never knew it to fail, I will say.

X Ques. 197. Are there not entries on the books of "D. G. S., 1869"?

Ans. Yes, sir; a great many.

X Ques. 198. The Keep grate was not invented until 1873?

Ans. 1872.

X Ques. 199. Then may not the letters "D. G. S., 1869" mean some other grate than the Keep grate?

Ans. "D. G., 1869" might mean the Keep grate, but generally it means the long bar.

X Ques. 200. Do you mean to say that it is impossible that the book-keeper, on receiving an order for a grate, might not put down "D. G." or "D. G. S.," and mean the long-bar grate?

Ans. He might have made a mistake.

X Ques. 201. If the letters and figures "D. G. S., 1869" might mean either a Keep or a long-bar grate, and generally meant the

long-bar grate, why might not the letters "D. G. S." standing alone mean either the Keep grate or the long-bar grate?

245 Ans. Because the firm meant to ship what a man wanted, and if he wanted a Keep grate they would generally ship it to him, but if a customer asked for a "D. G. grate, 1869," it looked very much as though he didn't know anything about the Keep grate, and in such a case they would ship him any grate they happened to have in stock, or, if they knew he wanted the 1869, they would ship it to him; some customers would say one and some another when they ordered a 1869.

X Ques. 202. If the letters "D. G. S." standing alone invariably meant the Keep grate, why did they make entries "D. G. S., 1873"? That meant Keep grate also, didn't it?

Ans. Yes, sir; it did.

X Ques. 203. What was the necessity of adding the figures "1873" if "D. G. S." always meant the Keep grate?

Ans. No necessity, but it was simply a copy of the customer's order, and in that case the customer thought that 1873 would make it more definite as to what grate he wanted, though D. G. S. grate would have been enough.

X Ques. 204. Where did you get your figures that you have put in evidence as to the stoves returned?

Ans. I got them from the statements rendered by the defendants to Mrs. P. P. Stewart, and I think they generally appeared on the January statement, which was the last statement of the year.

X Ques. 205. Mrs. P. P. Stewart was the owner of what was known as the "Stewart patents"?

Ans. Yes, sir; she was.

X Ques. 206. And the defendants manufactured the Stewart cook stove under those patents, didn't they?

Ans. They manufactured the 1859 stove under those patents.

X Ques. 207. Didn't they manufacture the stove after 1869 and 1873 under the Stewart patent?

246 Ans. No, sir; they manufactured them under the Keep patents.

X Ques. 208. What did they pay Mrs. Stewart royalties upon?

Ans. The agreement provided that on any inventions introduced by Keep they would agree to pay the royalty just the same afterward.

X Ques. 209. Did not the stoves manufactured after 1869 and 1873 contain the devices described and contained in the Stewart patents?

Ans. Some of them.

X Ques. 210. There were quite a large number of those patents, weren't there?

Ans. Only one or two patents that applied to cook stoves?

X Ques. 211. There were one or two that applied to cook stoves?

Ans. Yes, sir; there were.

X Ques. 212. And the statements that you refer to were statements made by the defendants as a basis for the payment of royalties to Mrs. Stewart?

Ans. They were.

X Ques. 213. How often were they made?

Ans. They agreed to make them once a month; sometimes they would run six months without making any.

X Ques. 214. Are you sure you examined all the reports made by the defendants from 1870 to 1882?

Ans. I found statements for each month until late in the year 1878; those I examined; whether they were all or not I can't tell.

X Ques. 215. You can't tell whether they were all the statements made by the defendants or not?

Ans. No, sir, I couldn't; they covered the whole time between those years.

X Ques. 216. At what date did you obtain your patent for water-backs?

Ans. I can't tell without reference to the patent.

247 X Ques. 217. Water-backs had been used before your invention?

Ans. They had.

X Ques. 218. A chambered water-back—that is, a water-back with a single chamber, or two chambers connected with each other, had been substituted for a coil of pipe before you made your invention?

Ans. Yes, sir.

X Ques. 219. Your invention consisted, didn't it, in the first place, of making that portion of the chamber directly over the fire a little deeper than the other, and also in making scolloped projections in that portion of the chamber over the fire; those were the two claims on which your claim was founded?

Ans. They were, if I recollect right, without reference to the patent.

X Ques. 220. Didn't the defendants before your invention use a water-back in their ranges?

Ans. I don't think they ever did.

X Ques. 221. Didn't they manufacture what used to be called the "Beebe range"?

Ans. I never saw it.

X Ques. 222. How do you know that Brown & Co. furnished the water-backs "complete," as you call it?

Ans. I know from having arranged with him for them that they were complete, except the fire-back, and no nipples or elbows furnished with them; they were tapped, reamed and tested.

X Ques. 223. Did you see all the water-backs that came from Brown & Co.?

Ans. I don't suppose I saw all of them, but I saw them from time to time, and was familiar with them.

X Ques. 224. You saw them occasionally?

Ans. Yes, sir.

X Ques. 225. Have you anything except your memory to
248 depend upon for this statement that you have made that the water-backs were complete with nipples and elbows?

Ans. I didn't say they were complete with nipples and elbows; I

said there were no nipples and elbows or the fire-back with them; no, sir, I have nothing but my memory.

X Ques. 226. What do you say now, were they furnished with nipples and elbows?

Ans. My memory, if it serves me, says they were furnished with nipples and elbows.

X Ques. 227. But you are not positive about it?

Ans. The book that I have referred to as owned by defendants stated that they were furnished by Brown & Co. without fire-backs; it doesn't state that there were nipples and elbows.

X Ques. 228. You said something on your redirect examination about two entries of ash pans charged $1 each; do you know what ash pans were referred to in those two entries?

Ans. Yes, sir, the ash pan in evidence; they were the Keep ash pan.

X Ques. 229. How do you know?

Ans. Because the ash pan that has been invariably shipped for the Stewart stove has been the Keep ash pan.

X Ques. 230. That is all the way you know?

Ans. There were the ash pans for 1869 or 1873 stove; the first entry was for the 1873 stove, and the second entry was for an 1869 Stewart.

X Ques. 231. Didn't the 1869 stove have an ash pan?

Ans. Yes, sir, has the Keep ash pan.

X Ques. 232. When was that ash pan invented by you?

Ans. Some time during 1869.

X Ques. 233. Did the 1859 stove have an ash pan?

Ans. No, sir, it didn't, none at all; it had a box on the door into which the ashes were drawn, but they had to be shoveled out by a shovel.

249 X Ques. 234. When did you see the cost book of which you have spoken in your redirect testimony?

Ans. I didn't see it after I left them in 1875, but saw it before that repeatedly.

X Ques. 235. Then you don't know that after 1876 they kept any such book, do you?

Ans. I do not.

Recess to 2.30 p. m.

PHILIP M. WALES, a witness produced upon behalf of the complainant, being duly sworn, to interrogatories propounded to him did make answers as follows.

Examined by Mr. DAVENPORT:

Ques. 1. What is your name, age, residence and occupation?

Ans. My name is Philip M. Wales; age, 41; residence, Troy; occupation, manufacturer of collars and cuffs.

Ques. 2. Do you know the parties to this action, William J. Keep, complainant, and Joseph W. Fuller, Walter P. Warren, George A. Wells and John Hobart Warren, defendants?

Ans. Yes, sir.

Ques. 3. Were you ever in the employ of the defendants?

Ans. Yes, sir.

Ques. 4. When did you commence such service and when did you terminate it?

Ans. I commenced in 1864, and I was in their employ until the spring of 1873, I think.

Ques. 5. Where were you first employed, and at what?

Ans. I was employed at the foundry.

Ques. 6. Give the places and different kinds of business you were employed in?

250 Ans. First as time clerk at the foundry, and then as book-keeper, and participated in the shipping and general office business; in the latter part of the time I was at the foundry; during 1868 and 1869 I was assistant superintendent, so rated, I believe, on account of my authority to draw orders and look after supplies, and in the spring of 1870 I moved to Cleveland, O., still continuing in their employ, but accepting a position there as salesman for their branch house; I continued there with them until the spring of 1873, I think it was; I was there three years at least.

Ques. 7. Were you well acquainted with the Fuller, Warren & Co. Stewart cook stove that was called the 1859?

Ans. The old Stewart stove, with the long doors in front, running down to the hearth, I believe, was called the 1859 stove; yes, I knew that stove very well.

Ques. 8. Were you acquainted with the stove called the 1869 stove?

Ans. Yes, sir.

Ques. 9. Were you engaged in selling the 1869 stove in Cleveland?

Ans. Yes, sir; that was the leading stove in stock.

Ques. 10. Were you familiar with the improvements made upon the 1859 stove called the Keep improvements, the flue plate, the ash pan, the raised hearth and doors, the offset bottom and damper?

Ans. Yes, I remember them very distinctly; I remember they were put on the old 1859 stove.

Ques. 11. In the year 1869 what was the *the* condition of the market, or sales, of the 1859 stove as compared with prior years?

Ans. Well, as I remember, the sales had run down to a very small amount comparatively, from the fact that the stove

251 was demonstrated to be a marketable stove only in wood sections; it was demonstrated pretty thoroughly that it was not a good coal stove; the objection at that time was, as I understood it, that there was no dumping grate, and the ash box was very shallow, and persons using it for coal had to pick out the clinkers and old fire and dig it out and shovel it out, and get it out as best they could, and there were no means of dumping the grate, and that was an objectionable feature in burning coal.

Ques. 12. State what effect the introduction of the Keep improvements which you have named had upon that stove in the market?

Ans. I could only speak so far as my experience in Ohio at that

time is concerned; I don't know what the general sales were all over the country; not being here but occasionally, and I had a very little opportunity of seeing it, but I know the trade in the Cleveland branch had run down to a very low figure; and it was debatable whether they wouldn't close that agency, but it was concluded that with the new stove and with somebody to push the trade they could bring back the demand, and I was sent out there to try and get back the trade of the Cleveland branch house; with that new stove I was fairly successful in doing that because we demonstrated that the stove was all right for coal and was very satisfactory in its working, and the trade was very much increased; dealers who had given up the old stove because it was not good for coal very gladly took hold of the stove because they conceded that the prestige of the Stewart stove was a good point in their trade, and that the improvement with the stove as they constructed it could get back their trade on that stove, and they did largely do that, I think.

Ques. 13. What difference is there in the Keep flue plate as introduced into the stove of 1859 over the old stove?

252 Ans. As I remember the Keep flue plate it was a curved plate, so that the effect was to increase the size of the flues both down and returning by having an oval flue in the center, and being pressed on the loose end of the flue plate toward the front—pressing out the sides and crowning in the center it gave a larger flue capacity and more draft, and it was particularly desirable in burning soft coal because the old stove was a source of a great deal of trouble; if anybody tried to burn soft coal the soot would cling on under all the flue plates and built itself full of adhesion, and they were very much annoyed and couldn't burn it with satisfaction at all; with the new flue plate that object- was done away with.

Ques. 14. Was there any difficulty as regards the old flue plate melting out?

Ans. Yes, there was a great deal of trouble in that respect; I have to take the word of those who used it; the bituminous coal makes a very hot, flashing fire, and the soot accumulating on the flue plate would burn there after a certain amount had accumulated there and have a tendency to melt down the old flue plate and warp it out of shape, causing a good deal of trouble.

Ques. 15. Did that same difficulty pertain to the flue plate of Mr. Keep?

Ans. No, sir, I think that trouble was obviated with his flue plate.

Ques. 16. During your employment in the West in the sale of the Stewart stove did you exhibit the stove of 1869 by making a practical experiment with it and baking with it?

Ans. Yes, sir, I did in a great many cases, in the stores of dealers and at the various sectional fairs, county and State; large fairs held at Cleveland called the Northern Reserve fair; I gave several exhibitions in Cleveland at different times where there was a

253 fair exhibition; once I believe there was an exhibition given there under the name of the Mechanical Arts exhibition, where there was an exhibition of this stove; but we made a point

more particularly in giving exhibitions in the towns at the stores and places of business of people who were dealers or who expressed a desire to see the good qualities of the stove demonstrated.

Ques. 17. What was the result of such experiments?

Ans. They were very satisfactory and almost phenomenal in their results; the public and the dealers themselves were very much surprised that such satisfactory results could be obtained from the stove under the conditions which we tested it under; it was a stipulated weight of coal, with a fire made in the morning, and weighing the coal and kindling and everything that went into the fire, and by doing a certain amount of work with that one fire, not touching it after it became thoroughly ignited; some 20 minutes after starting the fire we put on the last coal and then commenced the baking exhibition as soon as we got the oven so hot; baking a barrel of flour into bread, making something like 200 or more loaves of bread, roasting and cooking meat; my friend Keep will remember about a certain pig we chased all over the State of Ohio nearly to use at the exhibition at Columbus.

Ques. 18. Then did this Keep flue plate add to or detract from the selling value of the Stewart stove?

Ans. Well, relating to that section, I should think it added very materially to the selling of the stove; that in connection with the other improvements that were in use at that time; they all had their effect.

Ques. 19. What advantage, if any, did the Keep raised hearth and doors have over the hearth and doors of the stove of 1859?

Ans. By that arrangement the manufacturers were enabled
254 to put in a dumping grate and ash pan, which they could not do with the arrangement as before, still retaining the oven space.

Ques. 20. What advantage, if any, did the ash pan with its bail give to the stove over the 1859 stove?

Ans. It was considered to be a very prominent feature of the improvement, because people who had used the Stewart stove before always had to relieve the grate by drawing the ashes out with a poker into a drawer at the side of the door, and that was accompanied with more or less dirt and dust, and in this case with the ash pan the grate could be relieved from the ashes, and it could be removed next morning before kindling the fire without any dirt or annoyance to the house.

Ques. 21. Did the raised hearth and doors and the ash pan which have been spoken of add to or detract from selling value of the Stewart stove?

Ans. In my judgment it added to the selling value of the stove.

Cross-examined.

By Mr. COWEN:

X Ques. 22. The effect of Mr. Keep's improvements, as you understand them, was to adapt the Stewart stove of 1859 (which was the stove for burning wood) to burn coal?

Ans. Yes, sir.

X Ques. 23. There were other coal-burning cook stoves in the market at that time, were there not?

Ans. Yes, sir.

X Ques. 24. They had ash pits and dumping grates?

Ans. I believe they had.

X Ques. 25. You know they had, don't you?

Ans. Yes, sir; I don't recall the arrangement of them, but they must have had; I think it was that which necessitated this change to enable them to compete with other stoves.

255 X Ques. 26. They had ash pans also, of course?

Ans. Yes, sir.

X Ques. 27. When did you go to Cleveland for Fuller, Warren & Co.?

Ans. It was in the spring of 1870, what month I can't recall.

X Ques. 28. Did you remain there until the end of the year 1875?

Ans. I came away from there in the spring of 1873, I think.

X Ques. 29. You sold a good many stoves in 1870, didn't you?

Ans. Yes, sir.

X Ques. 30. How many did you sell in 1871, as compared with what you sold in 1870; did you sell more or less?

Ans. I can't recall; I can't answer that question; I have no means now of telling.

X Ques. 31. Don't you remember that the sale in 1871 fell of from that of 1870?

Ans. I think the business of the house increased in 1871—the entire business of the branch.

X Ques. 32. Don't you remember that the sale of this particular stove fell off in 1871 so it was less than in 1870?

Ans. I can't tell whether it was so or not.

X Ques. 33. How was it in 1872?

Ans. I can't tell that, either; it didn't come within my observation as to the sale of any particular article in the branch.

The defendants, in answer to the request of the complainant, present four books of price-lists, which they state are all that they can find, and complainant offers in evidence (for the purpose of showing the terms on which the goods were sold) page 1 of that of 1876, page 2 of that of 1877, page 3 of that of 1878, page 3 of that of 1879.

Defendants' counsel objects to the evidence upon the ground
256 that the statement is a mere offer for trade on the part of the defendants, and the price-lists are no evidence that any sales were made in accordance with those terms.

Objection overruled. Defendants except.

Further hearing adjourned to Saturday, Oct. 2d, 1886, 10 a. m.

TROY, N. Y., *October* 9, 1886—10 a. m.

The parties met pursuant to adjournment.

Present as before.

The complainant admits the due execution of contracts dated March 31, 1869, and November 2, 1868, between the defendants and P. P. Stewart, and between the plaintiff and defendants and Eliza C. Stewart.

Same received and marked "Def'ts' Ex. Nos. 1, 2 and 3," but complainant objects to the same as immaterial.

SILAS H. BROWN, a witness produced on behalf of the defendants, being duly sworn, to interrogatories propounded to him did make answer as follows:

Examined by Mr. COWEN:

Ques. 1. What was your business in 1876 and the years immediately succeeding?

Ans. Machinist and manufacturer at that time specially of water valves, water and gas valves.

Ques. 2. What was the name of your firm?

Ans. Brown & Co.

Ques. 3. Who were the partners?

Ans. William M. Cranston and William D. Clegg.

Ques. 4. Are you acquainted with the water-back patented by W. J. Keep and made for Fuller, Warren & Co. at that time?

257 Ans. Well, I couldn't say that I knew who patented it, but I know of manufacturing a water-back for Fuller, Warren & Co.

Ques. 5. Did you understand it was Keep's water-back?

Ans. No, sir.

Ques. 6. At that time, and during those years, you did manufacture a water-back for Fuller, Warren & Co.?

Ans. Yes, sir.

Ques. 7. What portion of the water-back according to your recollection did you manufacture?

Ans. Just the casting; simply the casting.

Ques. 8. You delivered the casting to Fuller, Warren & Co.?

Ans. Yes, sir; to the best of my recollection.

Ques. 9. And the casting, according to your recollection, was not tapped or reamed nor had any elbows attached to it?

Ans. No, sir.

No cross-examination.

WALTER P. WARREN, recalled, and testified on behalf of the defendants as follows:

Examined by Mr. COWEN:

Ques. 238. You are quoted by counsel for the complainant in a question propounded to Mr. Keep as stating that the Stewart stoves with the Keep patents would not burn coal; did you so state, and if not what did you say in that connection?

Ans. I stated they would not burn soft coal successfully.

Ques. 239. You didn't say they wouldn't burn hard coal or anything of that kind?

Ans. No, sir.

258 Ques. 240. Mr. Keep states in answer to question 158 that a large number of the 1867 stoves were returned and were fixed over from time to time, and it is said they would not burn coal; what was the fact in regard to these 1867 stoves; was it true that they would not burn coal?

Ans. No, sir; it was sold largely for coal.

Ques. 241. Were they returned to any extent for any other purpose than for repairs?

Ans. Never.

Ques. 242. Did Fuller, Warren & Co. make a stove with a raised hearth prior to the patented raised hearth of Mr. Keep?

Ans. Yes, sir.

Ques. 243. What stove was that?

Ans. The "Home Friend" and "Meridian."

Ques. 244. You didn't make the "Home Friend" until after the Keep patent, did you?

Ans. Oh, yes; it was a little earlier, I think; the "Meridian" was very much earlier; both these stoves have raised hearths.

Ques. 245. And they were prior to Keep's patent?

Ans. Yes, sir.

Ques. 246. Mr. Keep states in answer to question 145, "that the Stewart stove as made before these improvements had, practically, no sale after the year 1869, and if it had not been for these improvements, there would have been no Stewart stoves sold;" what was the fact about it?

Complainant objects as not being in rebuttal.

Overruled.

Ans. In 1869 the sale of the Stewart stove fell off two-thirds from what it was in the year 1868 without the improvements.

Ques. 247. Is it true that the Stewart 1859 was not a coal stove; that you couldn't burn coal in it?

Ans. No, sir; it was sold largely for coal as well as wood.

259 Ques. 248. It was a stove in which you could burn either coal or wood, as you liked?

Ans. Yes, sir; the 1859 stove was largely sold for coal.

Ques. 249. Though it didn't contain the dumping grate?

Ans. No, sir; but it had a shaking grate; a dumping grate was not known in those days.

Ques. 250. The Stewart stove of 1859 was a good coal stove?

Ans. Yes, sir; plenty of them in use today.

Ques. 251. You produced a statement here of the number of Stewart stoves returned in the different years covered by this examination; where did you obtain that statement?

Complainant objects to this testimony as introduced at an improper time, and as not in rebuttal of any testimony produced on the part of the complainant.

Overruled.

Ans. From the books of the company.

Ques. 252. And it was correct?

Ans. Yes, sir.

Ques. 253. Mr. Keep, in his testimony, without producing the reports made by your firm to Mrs. Stewart of royalties upon these stoves, states that those reports contain the statement of stoves returned, and that those statements did not agree with the record from the books as produced by you here; can you explain that discrepancy?

Ans. It occurred in consequence of stoves that were returned from our branch houses and were not sold; we never credited her royalties until the stoves were sold; these were stoves which were returned as inoperative; they were taken down and their plates used for repairs or else thrown away.

260 Ques. 254. They were stoves not returned from your customers, but returned from the branch houses and used in your business?

Ans. Yes, sir.

Ques. 255. In your direct examination you said something about the ash pan selling, handle and all, for about ten cents; were you speaking when you made that remark about separate sales of ash pans, or were you speaking about what the ash pan would be calculated at in the price of the entire stove?

Ans. I notice my testimony says "I guess" in the matter; I was calculating the cost in the stove as an entirety.

Ques. 256. Do you wish to correct your answer in any way?

Ans. Yes, sir; I should like to correct my answer as to the price; the calculation was made on the estimate of stock at the present time—at the time when the ash pans were made, the value of sheet iron, malleable iron, &c., was much higher than now, and I think the cost of the ash pan would run from 40 cents to 45 cents.

Ques. 257. And estimating its price as a part of the price of the entire stove how much do you think you would put it?

Ans. Forty-five cents or 50 cents.

Ques. 258. Did you make a water-back for your range before the Keep water-back was patented?

Ans. Yes, sir.

Ques. 259. How did that water-back sell as compared with the sale of the Keep water-back?

Ans. It was very much heavier and larger, and more expensive to make, and it was sold at a higher price; it weighed certainly four times as much as the Keep water-back.

Ques. 260. It was made for a range?

Ans. Yes, sir.

Ques. 261. Did it operate as well as the Keep water-back?

261 Ans. Operated better; the Keep water-back never operated very well.

Ques. 262. For the reason you gave on your former testimony, that it checked the draft?

Ans. I don't know that I testified to that, but I know it never operated very well.

Ques. 263. In 1876 and afterward what position did you hold in the Fuller & Warren Co.?

Ans. I had general charge of the manufacturing.

Ques. 264. Do you recollect that the firm of Brown & Co. furnished the Keep water-backs to your company?

Ans. Yes, sir.

Ques. 265. In what shape were these water-backs when they came from Brown & Co.?

Ans. Simply plain casting.

Ques. 266. Where was the tapping, reaming and attaching of the elbows and pipes done?

Ans. In the Fuller & Warren Co. works.

Ques. 267. You recollect that distinctly?

Ans. Yes, sir.

Ques. 268. When were your Fuller & Warren ranges first made and sold?

Ans. The Warren range was first made in 1868, and the Walker range (a smaller range) we manufactured previous to that.

Ques. 269. How long?

Ans. I couldn't say; for certainly several years back.

Ques. 270. You sold the "Golden Crown" and the "Home Friend," as well as the Stewart cook stove, did you not?

Ans. We sold them in limited quantities, because all our efforts were placed upon the Stewart cook stoves.

Ques. 271. The "Golden Crown" and "Home Friend" were coal cook stoves?

Ans. Used for coal and wood.

262 Ques. 272. Did they contain dumping grates and raised hearths?

Ans. Yes, sir.

Ques. 273. And what kind of a grate did they have?

Ans. They had the Hathaway, or long-bar grate, the same as was used in the 1869 Stewart stoves.

Ques. 274. And the one that has been put in evidence here?

Ans. Yes, sir.

Ques. 275. Those stoves were sold side by side with the Stewarts?

Ans. Yes, sir.

Ques. 276. Mr. Keep states that the long-bar, or Hathaway, grate was objectionable because it was short-lived; what have you to say about that, was the long-bar, or Hathaway grate more short-lived then ordinary grates?

Ans. It was not; it was used from 1869 in the Stewart cooking stoves, of which we made some 12,000 or 15,000 before the Keep grate was made, and was used largely in the "Golden Crown," the "Home Friend" and the "Meridian."

Ques. 277. And was satisfactory in all?

Ans. Yes, sir, except in the 1869 stove after the introduction of Mr. Keep's improvements; particularly his improvement of the ash chute; his ash chute was so close to the grate that it caused the

grate to burn out, the rear bar of the grate, and consequently he made his 1873, or short-bar grate to obviate that difficulty.

Ques. 278. What effect did that have upon his grate?

Ans. Well, it burned it out also.

Ques. 279. In your judgment was the Keep grate any longer lived grate than the Hathaway or two-bar grate?

Ans. Well, I should say that the Keep was of longer life
263 because it was more operative; the long bar of the Hathaway grate, which is in the rear, would burn out very rapidly, while the momentum to the Keep grate was from a center bar and the reflection from the front oven plate was more telling on the Hathaway than it was on the Keep grate.

Ques. 280. What you mean is that in the Stewart stove as improved by Mr. Keep the Keep grate would last longer?

Ans. I think it would some longer, but cases vary very much.

Ques. 281. And in the Stewart stove of 1869 and the "Home Friend," "The Golden Crown" and the "Meridian" it lasted how?

Ans. It lasted as long, if not longer, than the majority of grates manufactured.

Ques. 282. Could the Hathaway grate have been applied to the 1873 stove by changing the bed plate?

Ans. Yes, sir, it was fitted to it; it was largely used in the 1873 stove; it is the long-bar grate we have in controversy.

Ques. 283. It was largely used in the 1873 stove do you say?

Ans. Yes, sir.

Ques. 284. After Keep's grate was invented?

Ans. Yes, sir; it is the long-bar grate we have this controversy about now, and that is the Hathaway grate; used to a very great extent in the 1873 stove.

Ques 285. Then is there any reason why an order simply for a dumping grate should mean necessarily the Keep grate?

Ans. It didn't mean the Keep grate; it meant a dumping grate; either the Hathaway or Keep.

Ques. 286. And you filled the order as you saw fit?

Ans. Yes, sir.

WALTER P. WARREN.

264 Recross-examination:

By Mr. DAVENPORT:

X Ques. 287. I believe I understand you to have testified that you commenced the stove business in 1871?

Ans. You are correct.

X Ques. 288. Prior to that time did you have anything to do with the manufacture or sale of stoves?

Ans. I did not.

X Ques. 289. You speak of stoves having been returned on the ground that they were inoperative; is it true that if one stove of the same kind was inoperative that they would all be inoperative?

Ans. No; if one stove was inoperative it is not true that all should be imoperative.

X Ques. 290. All of the same kind, I say?

Ans. Well, it depends upon circumstances.

X Ques. 291. If any one of the stoves which you call the 1869 stove was inoperative must not all of the same kind of stoves been inoperative?

Ans. Not necessarily.

X Ques. 292. Why, then, would one stove cast from the same set of patterns be inoperative and another operative; would it be from the fault of manufacturing?

Ans. It might in some cases, and it might be the fault of the person who was operating the stove.

X Ques. 293. Unless the fault was in the manufacture of one stove out of a great many of the same kind of stoves, that one stove would not be, in fact, inoperative, would it?

Ans. It might be.

X Ques. 294. Why would it be?

Ans. I couldn't say why it would; when you are making goods by the thousands occasionally some one piece may be inoperative in your judgment, and it may be inoperative in the judgment of the consumer.

265 X Ques. 295. If it were inoperative on the one piece you speak of, would that be because that one piece was not properly constructed?

Ans. It might be.

X Ques. 296. Can you give any other reason why the one piece should be inoperative than that it was faultily constructed?

Ans. I cannot, if all the other pieces were operative.

WALTER P. WARREN.

L. W. DRAKE, recalled on behalf of the defendants, and testified as follows:

Examined by Mr. COWEN:

Ques. 421. In answer to question 110, at page 132, Mr. Keep stated: "The reason why I say that 'D. G. S. grate' always refers to the Keep grate is this: The 1869 grate was short lived, sometimes only lasting a few weeks, and never as long as a grate should last, therefore damaging the reputation of Fuller, Warren & Co." What are the facts, as you recollect them, about the durability of the 1869 grate?

Ans. I used the grate in a stove in 1871 and 1872, and I didn't find that it was short lived.

Ques. 422. How was it as compared with ordinary grates?

Ans. As long lived as ordinary grates.

Ques. 423. If you have had any experience with the long-bar grate and the Keep grate I wish you would state as to their comparative durability.

Ans. In the year 1871 or 1872, when the Keep grate was first brought out, I was requested to take one home and put it in my

stove and give it a trial; I did so, and used it three months; I had to take it out on account of the rear end of the bar burning off.

266 Ques. 424. Leaving a space through which the coal could go down?

Ans. Yes, sir.

Ques. 425. Do you think the Keep grate is any longer lived than the two-bar grate?

Ans. It was not in that case; that Keep grate was considered a better grate where people used large-sized stove coal, and the long-bar was preferred by those who used the chestnut or pea coal.

Ques. 426. Were the letters "D. G. S." used to designate grates upon your books before you manufactured the so-called Keep grate?

Ans. Yes, sir.

Ques. 427. Then when Mr. Keep testifies in answer to question 111 that the words "D. G. shaking grate" necessarily mean the Keep grate, is his statement correct?

Complainant objects as not in rebuttal of any testimony given on the part of the plaintiff.

Overruled.

Ans. I think he is not correct.

Ques. 428. Is it your recollection that the Hathaway, or long-bar, grate was largely used for the 1873 stove as well as the 1869?

Ans. Yes, sir; it was used in the 1873 stove.

Ques. 429. Is it true that when an order was found on the books simply for a D. G. S. grate that your company would necessarily ship a Keep grate, as stated by Mr. Keep?

Complainant objected for the same reason as last above.

Ans. In some cases they might ship a Keep grate and in some cases they might ship an 1869.

Ques. 430. Have you any personal knowledge of the water-backs furnished by Brown & Co.?

Ans. I testified as to the water-backs; I have personal knowledge of their coming there.

267 Ques. 431. Do you recollect the condition in which they came from Brown & Co.?

Ans. To the best of my recollection they came to the foundry in an unfinished state, simply the castings.

Ques. 432. And they were tested, tapped, reamed and elbows and pipes attached at your foundry?

Ans. Yes, sir.

Ques. 433. Do you wish to correct your statement in your former examination as to the cost of these water-backs?

Ans. I do.

Ques. 433½. State in what respect.

Ans. In my former testimony I went more by memory than anything else, but I find on examining the books I was wrong in some particulars; in my former estimate I included the brass couplings,

which was not correct; I find that the prices of the cost should have been $2.58 for the 4½ and $2.75 for the 5½.

Ques. 434. Those were the items of cost?

Ans. Yes, sir.

Ques. 435. Mr. Keep testifies that he finds upon the books of the defendants that they sold a water-back for $11.50 to E. P. Carpenter, of Pawtucket, R. I.; state, if you know, what kind of a water-back that entry referred to.

Ans. Brass water-back.

Ques. 436. Made to order?

Ans. Yes, sir.

Ques. 437. Were the long-bar grates used from 1876 up to 1882 made and put into other stoves than the Stewart stove?

Ans. No, sir, not what we call the Stewart long-bar grates; there were long-bar grates made.

Ques. 438. Made in the same way only they had a different bed plate?

Ans. Yes, sir.

268 Ques. 439. Then long-bar grates working like the Hathaway grate were made and put into other stoves?

Ans. Yes, sir.

Ques. 440. What other stoves?

Ans. They were used in what we call the hot-blast range, on the "Occidental range."

Ques. 441. In any cook-stove as distinguished from ranges?

Ans. We were manufacturing the "Golden Crown" along up to 1876 and 1877, and they were used in that stove.

Ques. 442. Mr. Keep testifies that there is still a demand for those 1873 stoves, although it is understood they are not manufactured; is there also a demand for the 1869 stove also?

Ans. There is no demand for the 1869 or 1873, but there is a demand for the 1859; we can very readily sell the 1859 stoves if we happen to get one in exchange; but there is no demand for the 1869 or 1873 stove.

Ques. 443. Mr. Keep in answer to question 117 says that you alluded to a No. 6½ stove, and this is the question put to Mr. Keep: "In answer to question 127 Mr. Drake states that Nos. 6½, 7½, 8½ and 9 had a short-bar and a long-bar grate for such patterns," and Mr. Keep says you made a mistake in mentioning 6½, as there was no such stove.

Ans. The mistake arose by Mr. Davenport in cross-examination asking me as to 6½, 7½, 8½ and 9, and I answered the question without mentioning any size.

Ques. 44-. He is correct in saying there was no 6½ stove?

Ans. Yes, sir, there is no 6½.

No cross-examination.

L. W. DRAKE.

The defendants here rest.

Adjourned without day.

269 United States Circuit Court, Northern District of New York.

WILLIAM J. KEEP, Respondent,
ag'st
JOHN HOBART WARREN, GEORGE A. WELLS, and WALTER P. WARREN, Survivors of Joseph W. Fuller, Deceased, Appellants.

It is hereby stipulated by and between the parties to this case that the clerk may file the printed copy of the testimony taken by both parties in this suit instead of the original manuscript.

Also that the original exhibits on file in the clerk's office be sent up with the return for use on argument in supreme court, & that copies thereof may be omitted from the transcript of record on appeal.

ESEK COWEN,
Solicitor for Defendant.
N. DAVENPORT,
Sol. for Pl'ff.

Indorsed: Stipulation as to filing of testimony. Filed Dec. 30, 1890. W. S. Doolittle, clerk.

270 *Opinion.*

United States Circuit Court, Northern District of New York.

WILLIAM KEEP
vs.
JOSEPH W. FULLER *et al.* } In Equity.

Exceptions to master's report.

N. Davenport, for the complainant.
Esek Cowen, for the defendants.

COXE, *J.*:

On the 20th of March, 1883, a decree was entered in this action in favor of the complainant, sustaining, among others, letters patent No. 139,583, granted to him June 3, 1873, for an improvement in stove grates. The defendants were held to be infringers, and it was referred to a master to ascertain and report the amount of profits and damages. On the 17th of June, 1889, the master filed a report, in which he found that complainant's damages amounted to six cents and that the defendants' profits resulting from the sale of the infringing grates from January 1, 1876, to January 1, 1882, the dates fixed by the decree, aggregated $11,363.54, and for this sum, with the six cents added, judgment was awarded. The defendants thereupon filed sixteen exceptions to the report, insisting that the
271 master erred for the following reasons: First, there was no definite evidence of the number of infringing grates sold by defendants, and, second, there was nothing to show how much of the profits received by the defendants was due to their use of the invention.

It is wise to remember at the outset that the court is not now to decide *de novo* the various questions presented on the accounting. The present investigation is confined simply to the question, Did the master make any mistake which requires the setting aside of his report? He stands as the representative of the court and is better able by far than one who only reads the testimony from a printed book to tell what witnesses are entitled to credit and where the truth lies in the controversy before him. His findings are, *prima facie*, correct, and the burden of showing error is upon the party who excepts. If the proof is sufficient to sustain the master's finding it is enough. The investigation terminates at this point, even though the court, sitting in the master's place, might upon similar evidence reach a different result. "The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

Tilghman *v.* Proctor, 125 U. S., 136, 149; Callaghan *v.* Myers, 128 U. S., 617, 666; Kimberly *v.* Arms, 129 U. S., 512, 525; Central T. Co. *v.* Texas R. Co., 32 Fed. Rep., 448; Welling *v.* La Bau, 34 Fed. Rep., 41, and cases cited.

272 Tested by the rule of these cases it cannot be said that the master's findings of fact are erroneous except, perhaps, in a few particulars, which will be referred to hereafter. Certainly there were two sides to the controversy before him, and he was justified in his conclusions if he accepted as correct the evidence of the complainant.

The latter is criticised for testifying regarding matters of which it is said he could have no personal knowledge; but it would seem, from his long connection with the defendants and his knowledge of the stove business generally, that he was at least as competent a witness as any produced on the part of the defendants. In many important particulars his evidence is corroborated. The data from which the master made up the report came from the defendants' books. The defendants did nothing to lighten his labors in this regard. Perhaps they were not called upon to do so; but when a party is compelled to go into his adversary's camp for proof the rules are relaxed somewhat in his favor and presumptions are permitted which would not be permissible in other cases. Especially is this true where the adverse party has it in his power to explain and fails to do so.

After an examination of the testimony, the exhibits, and the carefully prepared schedule of sales the court is not prepared to say that the report is against the weight of evidence. When considered in its entirety it is not an extravagant but a conservative report.

273 The master finds that between January 1st and July 1st, 1879, the defendants made and sold 400 infringing grates, realizing a profit therefrom of $348. This amount is arrived at not from statements in the books or from direct evidence of any kind, but is the result of a guess based upon a comparison of sales

during the corresponding months for the year before and the year after. The testimony is insufficient to support the finding.

The finding as to the number of grates sent to the branch houses at New York, Chicago, and Cleveland is founded upon statements too problematical and speculative to be accepted as proof.

The exceptions which challenge these two findings are the twelfth and the fourteenth.

They are sustained.

The finding as to the number of grates sold at defendants' retail store was not excepted to.

The remaining question is whether the facts bring the case within the rule requiring complainant to point out what portion of the profits is due to the patented feature, or, in other words, whether the patent is for an entire device or only for an improvement upon an existing device.

Two of the claims are as follows:

"A stove grate provided with transverse bars which are capable of a vibratory motion in a horizontal plane and of a semi-rotation in a vertical plane upon or around the center of vibration, substantially as and for the purpose specified.

"The hereinbefore-described fire-grate, as a whole, when its several parts are constructed and combined to operate in the manner and for the purpose shown and described."

274 The master's report contains the following statement upon this subject: "Letters patent No. 139,583 is for a stove grate. This grate is a complete combination in itself. The parts and combinations described and claimed in the several claims in the patent constitute the entire device."

The master has carefully eliminated from the account all grates which were sold in or with a stove, and has confined it entirely to such grates as were sold as separate and independent articles.

The defendants question the novelty and utility of the invention and seek to limit the construction to be placed upon the claim by references not now before the court. Such questions cannot be considered. They are merged in the decree. The court, apparently without much opposition from the defendants, decided the patent valid in its entirety as to each and all its claims, and that the defendants were infringers, having sold the identical thing covered by the patent. This decree cannot be questioned here.

That the claims cover the fire-grate as a whole there can be no doubt, and there is a clear distinction between an improved grate and an improvement on a grate.

The complainant's grate was made and sold separately from stoves. Unquestionably it was intended for use in stoves, but so are many devices which may be the subject of distinct inventions. It was not sold for use in one pattern of stove alone; it could be

275 used in many different stoves. Although in general appearance like other grates, it is so constructed that no part can be used upon any other grate and no part of other grates can be used upon it. Remove the patented features and nothing remains. Although it is an improvement upon stoves, the complainant is not seeking to

recover the profits upon the stove, but upon the improvement only. The rule requiring that the profits arising from the patented features must be separated from those arising from the unpatented features has little application in a case where every feature is patented. This distinction is clearly pointed out in Maier *v.* Brown, 17 Fed. Rep., 736, cited with approval upon defendants' brief.

The court says: "Thus, if one discovers a new composition of matter, such as gun cotton, nitro-glycerine, or vulcanized rubber, or invents some new machine, such as the telephone, or some new article of manufacture, such as barbed wire, or a new pavement, he would obviously be entitled to damages arising from the manufacture and sale of the entire article. Upon the other hand, if his invention was limited to a particular part of a large machine, such as the cut-off of an engine, the axle of a wagon, or the seat upon a mowing machine, it is equally clear that his recovery must be limited to such profits as arise from the manufacture and sale of the patented feature."

Even when an invention belongs to the second class named in the quotation, is it not true that the patentee is entitled to recover the profits made by an infringer where the article is com-
276 plete in itself and is sold separately from the machine, the operation of which it is intended to improve?

Take, for illustration, "the seat upon a mowing machine." Suppose a person invents such a seat, operating upon an entirely new principle and designed to fit all mowing machines, and has it patented; can it be that one who sells this seat alone can escape liability because it is an improvement on a mowing machine or because seats for the drivers of such machines had been known before?

It is thought, therefore, that the facts do not bring this case within the rule of Garretson *v.* Clark, 121 U. S., 120, but rather within the rule of the following authorities:

Elizabeth *v.* Pavement Co., 97 U. S., 126; Manufacturing Co. *v.* Cowing, 105 U. S., 253; Hurlbut *v.* Schillinger, 130 U. S., 456, 472; Zane *v.* Peck, 13 Fed. Rep., 475; Reed *v.* Lawrence, 29 Fed. Rep., 915, 918.

The twelfth and fourteenth exceptions are allowed and the others are overruled.

The amount found due by the master is reduced from $11,363.60 to $10,510.86, and, as so reduced, his report is confirmed, with interest from the date of its submission to the court (Tilghman *v.* Proctor, 125 U. S., 136, 161; Illinois Cent. R. *v.* Turrell, 110 U. S., 301) and costs, as provided by equity rule eighty-four.

Indorsed: Decision. Master's report. Coxe, J. Filed Jul- 14, 1890. W. S. Doolittle, clerk.

277 *Appeal and Order.*

Appeal.

Circuit Court of the United States, Northern District of New York.

WILLIAM J. KEEP, Respondent,
against
JOHN HOBART WARREN, GEORGE A. WELLS, and WALTER P. WARREN, Survivors of Joseph W. Fuller, Deceased, Appellants.

The above-named defendants, John Hobart Warren, George A. Wells, and Walter P. Warren, survivors of Joseph W. Fuller, deceased, conceiving themselves aggrieved by a judgment entered October 2nd, 1890, against them for the sum of eleven thousand seven hundred seventy-seven dollars and eighty-two cents, damages and costs, in the above-entitled proceedings, do hereby appeal from said judgment to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was entered, duly authenticated, may be sent to the Supreme Court of the United States.

ESEK COWEN,
Solicitor for Defendants and Appellants,
15 *Wall St., New York, N. Y.*

New York, October 15, 1890.

And now, to wit, on October 15, 1890, it is ordered that *that* the above appeal be allowed as prayed for.

E. HENRY LACOMBE.

Indorsed: Appeal & order. Filed Oct. 24, 1890. W. S. Doolittle, clerk.

278 *Bond on Appeal.*

Circuit Court of the United States for the Northern District of New York.

WILLIAM J. KEEP, Respondent,
against
JOHN HOBART WARREN, GEORGE A. WELLS, and WALTER P. WARREN, Survivors of Joseph W. Fuller, Deceased, Appellants.

Know all men by these presents that we, J. M. Warren and C. W. Tillinghast, both of the city of Troy, Rensselaer county, New York, are held and firmly bound unto the above-named William J. Keep in the sum of twenty-five thousand dollars to be paid to the said William J. Keep; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eighth day of October, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named John Hobart Warren, George A. Wells, and Walter P. Warren, survivors of Joseph W. Fuller, deceased, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the northern district of New York:

279 Now, therefore, the condition of this obligation is such that if the above-named John Hobart Warren, George A. Wells, and Walter P. Warren, survivors as aforesaid, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. H. WARREN. [L. S.]
C. W. TILLINGHAST. [L. S.]

Sealed and delivered and taken and acknowledged this 8th day of October, 1890, before me—

CHARLES S. BRINTNALL,
Notary Public, Rensselaer County, New York. [L. S.]

UNITED STATES OF AMERICA, }
Northern District of New York, } ss:

J. M. Warren and Charles W. Tillinghast, being severally sworn, depose and say, each for himself, that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

J. H. WARREN.
C. W. TILLINGHAST.

Sworn to this 14th day of October, 1890.

CHARLES S. BRINTNALL,
Notary Public, Rensselaer County, New York. [L. S.]

Indorsed. Bond on appeal. Approved: E. Henry Lacombe. Filed Oct. 24, 1890. W. S. Doolittle, clerk.

280 *Citation.*

UNITED STATES OF AMERICA, ss:

To William J. Keep, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October, 1890, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein William J. Keep is respondent and John Hobart Warren, George A. Wells, and Walter P. Warren, survivors of Joseph W. Fuller, deceased, are appellants, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety.

E. HENRY LACOMBE.

281 [Endorsed:] U. S. circuit court, northern district of N. Y. William J. Keep, resp'd't, ag'st John Hobart Warren, George A. Wells, and Walter P. Warren, survivors of Joseph W. Fuller, deceased, appellant-. Citation. Esek Cowen, soli'r for def'ts & app'l'ts, 15 Wall St., New York. U. S. circuit court, N. D. of N. Y. Filed Oct. 24, 1890. W. S. Doolittle, clerk. D. October 20, 1890. Due service of a copy of the within citation is hereby admitted. N. Davenport.

282 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 281, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William J. Keep *vs.* John Hobart Warren, George A. Wells, and Walter P. Warren, survivors of Joseph W. Fuller, deceased, as the same remain of record and on file in said office and have been stipulated by and between the solicitors for the respective parties.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this fifth day of November, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: Case No. 14,418. N. New York C. C. U. S. No. 350. John Hobart Warren, George A. Wells, & Walter C. Warren, survivors of Joseph W. Fuller, deceased, appellants, *vs.* William J. Keep. Filed November 12, 1890.

No. 350.
Warren Chal & Keep

W. J. KEEP.
Stove-Grates.

No. 139,583. Patented June 3, 1873.

Fig. 1.

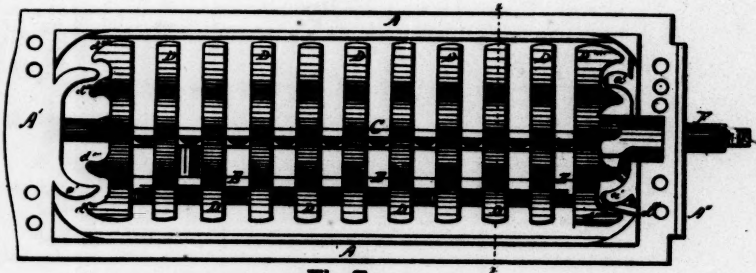

Fig. 2.

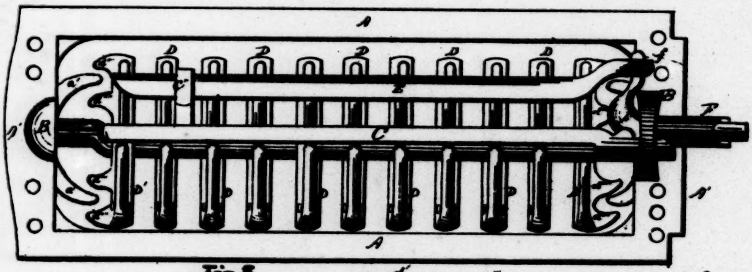

Fig. 3.

Fig. 4.

Fig. 8.

Fig. 5.

Fig. 7.

WITNESSES:
Jas. E. Hutchinson
John R. Young

INVENTOR.
Wm. J. Keep, by
Prindle and Co. his
ATTORNEYS.

Supreme Court of the United States, October Term, 1893.

JOHN HOBART WARREN and Others, Appellants, *ag'st* WILLIAM J. KEEP, Appellee. } No. 350. Stipulation.

Whereas the transcript of the record in the above-entitled appeal does not contain as an exhibit letters patent No. 139,583, dated June 3, 1873, introduced in evidence by the complainant and marked "Exhibit A" at folio 67 of the record, it is hereby stipulated by and between the parties to this appeal that the clerk of the Supreme Court be requested to procure a copy of such patent and bind it at the end of the record in this case.

ESEK COWEN,
Counsel for Appellants.
N. DAVENPORT,
Coun'l for Appellee.

UNITED STATES PATENT OFFICE.

WILLIAM J. KEEP, of Troy, New York.

Improvement in Stove-grates.

Specification forming part of Letters Patent No. 139,583, dated June 3, 1873; application filed April 4, 1873.

To all whom it may concern:

Be it known that I, William J. Keep, of Troy, in the county of Rensselaer and in the State of New York, have invented certain new and useful improvements in stove-grates; and do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing making a part of this specification, in which—

(Here follows diagram marked page 4.)

Figure 1 is a plan view of the upper side of my improved grate. Fig. 2 is a like view of the lower side of the same. Fig. 3 is a cross-section upon line *x x* of Fig. 1, and Figs. 4, 5, 6, and 7 are, respectively, perspective views of a grate-bar, the pivotal or center bar, the shaking bar or shank, and the parallel or connecting bar.

Letters of like name and kind refer to like parts in each of the figures.

The object of my invention is to increase the strength, efficiency, and durability of stove-grates; and it consists, principally, in a grate provided with transverse bars, which are capable of a vibratory motion in a horizontal plane, and of a semi-rotation in a vertical plane,

upon or around the center of vibration, substantially as and for the purpose hereinafter specified. It consists, further, in the suspension of transverse bars from or upon a central longitudinal bar, so as to render the former capable of vibration at their points of suspension, substantially as and for the purpose hereinafter shown. It consists, further, in the combination of the parallel connecting and vibrating bar with the transverse or grate bars, substantially as and for the purpose hereinafter set forth. It consists, further, in the construction and combination of the central supporting or pivotal bar and the shaking-shank, substantially as and for the purpose hereinafter shown and described. It consists, further, in the shaking-shank and its combination with the pivotal and vibrating bars, substantially as and for the purpose hereinafter specified. It consists, further, in the means employed for protecting from dust the joint between the central pivotal bar and the shaking-shank, substantially as and for the purpose hereinafter shown. It consists, further, in the construction and combination of the end vibrating grate-bars and the contiguous portions of the bed-plate, substantially as and for the purpose set forth. It consists, finally, in the grate as a whole, when its several parts are constructed and combined to operate substantially as and for the purpose hereinafter shown and described.

In the annexed drawing, A and A represent the sides, and A′ and A″ the ends, of a bed-plate having the usual exterior form, and provided upon its lower side, and at the longitudinal centers of said ends, with two semicircular bearing-lugs, B, within which rests a metal bar, C, having the shape shown in Fig. 5. The bar C is composed of two parallel bars (seen in Fig. 3) connected together at suitable intervals, so as to leave between their contiguous edges a series of openings, *c*. Upon the upper edge of said bar are provided a number of lugs, *c′*, which extend upward for a short distance and form a series of notches, *c″*, that correspond in number and vertical position to or with the openings *c*. Within each notch *c″* is placed a grate-bar, D, which has the form shown in Figs. 3 and 4, extends transversely across the bar C, and is provided with a curved lug, *d*, that extends downward into and through the opening *c*, and secures said parts in relative vertical and lateral positions. An angular lug, *d′*, projecting downward from the lower side of said grate-bar, opposite to the lug *d*, and fitting into a corresponding groove formed in the upper side of said bar C, and a shoulder, *d″*, formed upon said lug *d* and bearing against the sides of the opening *c*, (as seen in Fig. 3,) prevent said grate-bar from turning upon said bar C. Upon the lower side of each grate-bar D, and at the end opposite to the lug *d* is provided a hooked lug, *d‴*, that extends downward and then horizontally outward to or near a point opposite the end of said bar, and furnishes a bearing for, and upon which is placed, a connecting-bar, E, that has the form shown in Fig. 7, said bar E being provided with a series of openings, *e*, which correspond in size, number, and position to the like features of the lugs *d‴* of the series of grate-bars. As the grate-bars fit loosely into the notches *c″* it will be seen that, by moving the connecting-bar E longitudi-

nally and alternately in opposite directions, a uniform vibratory motion will be given to the series of grate-bars, which motion will be in a horizontal plane, and its center will be the point of intersection, vertically, of said grate-bars and the center-bar C. In order that the grate-bars may be shaken when desired, the outer end of the bar C is enlarged, and upon one side is provided a semi-cylindrical recess, C′, within which is fitted a bar, F, (seen in Figs. 3 and 6,) that, when in place, substantially completes the circular lines of said enlargement, and enables it to fill loosely the bearing B. The inner end of the bar F curves to one side, as seen, and passes into and through one end of the connecting-bar E, after which said end turns sharply downward, so as to form a locking-lug, *f*, which insures the relative positions of said parts. Upon the rear or outer side of the curved portion of the bar F is provided a lug, *f′*, having parallel upper and lower sides, which fits into a corresponding slot, *c‴*, provided within the enlarged end of the pivotal bar C, and prevents said bar F from rotating within the recess C′. As thus combined, it will be seen that if the outer end of the bar F be moved sidewise or in a horizontal plane its curved portion will rock within the recess C and form the equivalent of an axial bearing for the same, and that such movement of said bar, communicated through its inner end to the connecting-bar E, will cause the grate-bars to vibrate upon their axial bearings. The outer end or shank of the bar F is so constructed as to enable it to receive a shaker-handle of ordinary form. In order that ashes and dust may be prevented from entering the recess C′, so as to injure the parts or to obstruct their operation, a lip, *c⁗*, is provided upon the upper side of the enlarged end of the bar C, which lip extends over and forms a shield for said parts. The forward end of the connecting-bar E is sustained in position vertically by means of the shank-bar F, while its rear end rests upon a lug, C″, which extends horizontally outward from the bar C, by which means said connecting-bar, not being dependent for support upon the grate-bars, does not in any manner cramp or confine them, except within the desired limits. The end grate-bars D′ are each provided with a number of spurs, *d⁗*, which extend outward toward the end A′ of the bed-plate, and at their outer sides are formed upon curved lines of which the axis of horizontal motion is the center. The inner edge of the said bed-plate is in like manner provided with a series of spurs, *a′*, which are formed upon lines concentric to those of said spurs *d⁗*, and are so placed as to pass between the latter whenever the grate is shaken. By this arrangement the movement of the end bars thoroughly agitates the coal resting thereon without in any manner increasing the resistance offered or rendering more strength necessary to operate the grate.

Owing to the construction of the grate-bars, the side of the grate opposite to the connecting-bar is the heaviest, and when unobstructed drops downward to a horizontal position, beyond which it is prevented from passing by the forward end of said connecting-bar, which impinges against the lower side and forward end of the bed-plate.

The grate is now complete, and possesses the following-named advantages: First, by the use of transverse instead of longitudinal bars, the injurious effect of the extreme heat of the burning fuel is so much reduced as to be but one-ninth as great as in grates where the bars are longitudinal. Second, the bearing-surfaces are so fully protected from the direct action of the heat, and from ashes and dust, as to materially increase the durability of the grate over those commonly employed. Third, as a whole, the grate is simple in construction, easy of operation, and efficient in clearing the fuel from ashes and clinker.

Having thus fully set forth the nature and merits of my invention, what I claim as new is—

1. A stove-grate provided with transverse bars, which are capable of a vibratory motion in a horizontal plane, and of a semi-rotation in a vertical plane, upon or around the center of vibration, substantially as and for the purpose specified.

2. In a stove-grate a series of transeverse grate-bars suspended from or upon a central longitudinal supporting-bar, so as to be capable of horizontal vibration at their points of suspension, substantially as and for the purpose shown.

3. The connecting or vibrating bar E provided with the openings *e*, in combination with the grate-bars D provided with the curved spurs *d'''*, substantially as and for the purpose set forth.

4. In combination with a central, pivotal, or supporting bar, a shank so arranged that by vibrating its outer end sidewise its inner portion shall communicate to the ends of the lateral grate-bars a vibratory motion in a contrary direction, substantially as and for the purpose shown and described.

5. The shank F capable of the motion described, and combined with the pivotal bar C, and the vibrating or connecting bar E, substantially as and for the purpose specified.

6. In combination with the bar C provided with the recess C′ and with the shank-bar F, the lip *c''''* secured upon said pivotal bar, and extending over said shank-bar, substantially as and for the purpose shown.

7. The pivoted, end grate-bars D′, provided with the spurs *d''''*, in combination with the ends A′ of the bed-plate provided with the spurs *a′*, substantially as and for the purpose set forth.

8. The hereinbefore-described fire-grate as a whole, when its several parts are constructed and combined to operate in the manner and for the purpose shown and described.

In testimony that I claim the foregoing, I have hereunto set my hand this 2d day of April, 1873.

WILLIAM J. KEEP.

Witnesses:
HENRY W. LAURN.
JAMES DARROW.

[Endorsed:] Case No. 14418. Supreme Court U. S., October term, 1893. Term No., 350. John Hobart Warren *et al.*, app'ts, *vs.* Wm. J. Keep. Stipulation and addition to record. Filed M'ch 22, 1894.

U. S. Supreme Court.

WILLIAM J. KEEP,

Appellee,

vs.

JOHN HOBART WARREN AND OTHERS,

Appellants.

ARGUMENT OF ESEK COWEN FOR THE DEFENDANTS.

Law Reporting Print Job Printing House, New York.

Supreme Court of the United States.

WILLIAM J. KEEP,
Appellee,

AGST.

JOHN HOBART WARREN and others, survivors of Joseph W. Fuller, deceased,
Appellants.

This is an appeal from a judgment of the Circuit Court, for the Northern District of New York, in favor of the above named complainant, and against the above named defendants, for the sum of $11,777.82, as profits derived by the defendants from the sale of a certain stove grate, which was an infringement of Letters Patent, issued to the above named complainant on June 3, 1873, together with the costs of this action.

Statement of Facts.

On the 14th day of March, 1881, the complainant in this case filed his bill of complaint, alleging his ownership of certain Letters Patent of the United States, as follows:

Patent dated June 1, 1869, and numbered 90,756.
Patent dated June 1, 1869, and numbered 90,850.
Patent dated March 29, 1870, and numbered 101,368.
Reissue dated May 16, 1871, and numbered 4,386.
Patent dated July 16, 1872, and numbered 121,676.
Patent dated July 16, 1872, and numbered 123,348.
Patent dated June 3, 1873, and numbered 139,583.
Design patent dated October 5, 1875, and numbered 8,635.

And the said complainant charged infringement by the defendants of said several Letters Patent.

The defendants answered, setting up various defenses, and a replication was filed, but on the 20th day of March, 1883, a decree was entered, by consent, in favor of the complainant, declaring that the various Letters Patent set forth in the claim were good and valid, and that said complainant was the first inventor of the improvements therein described. Said decree further declared that the defendants had infringed all of said Letters Patent, except the one dated July 16, 1872, and numbered 123,348. It directed an accounting for profits and damages upon all the patents so declared to be infringed, except that the decree contained the following proviso:

(Page 20 of Record.) "That such gains, profits, "damages and accounting shall not apply to any "stoves made or sold by said defendants before Feb- "ruary 1, 1876, nor to any grates made or sold by "said defendants before that date, except as to "grates covered by said Letters Patent No. 139,583, "and supplied by defendants after January 1, 1876,

"to stoves originally sold by them without such "grates."

The case was referred to a Master for an accounting, and considerable evidence taken before him. The report of the Master begins on page 22 of the printed Record. The Master disallowed all claims for profits or damages, under patents Nos. 90,756, 90,850, reissue 4,386 and design patent No. 8,635 (fols. 47 and 48).

As to Letters Patent No, 121,676, which related to "water backs" for stoves, he finds a profit realized by the defendants of $225.12, but in the final statement of the sum awarded for profits realized from these infringements he does not include this $225.12. The whole amount of profits is made up of profits upon the sales of grates, and it is for those profits alone that judgment was entered; consequently the judgment does not contain this profit of $225.12, and it is not necessary to examine here the exception to such profit, as no legal result followed the finding of this fact.

The entire damages, therefore, awarded by the Master to the complainant upon this accounting consists of $11,363.54 profits upon the sale of *grates*, and $.06 damages, making the whole award $11,363.60, besides costs (fol. 55).

According to the statement of the Master, this award was made up entirely of grates which were sold as separate and independent articles, and not in connection with the stove (fol. 49).

The Master found that between January 1, 1876, and January 1, 1882, the defendants sold, as aforesaid, grates, upon which the profits amounted to $11,363.54. Owing to the changes in price, the accounting covers different periods, which are stated in detail in the Master's report, but which it is not necessary to repeat here. The defendants filed exceptions, the substance of which was, that, in each of these detailed statements, the Master had found, without evidence, the number of the infringing grates sold by the defendants, and that in neither of

said cases was there any evidence given upon which he could find the amount of profits which the defendants had realized *from the infringement.*

The learned Circuit Court sustained the twelfth and fourteenth exceptions of the defendants, upon the ground that the statements of the number of grates sold to which exception was taken were mere guesses of the complainant, and not founded upon evidence. As to the remainder of the report, it was confirmed by the Circuit Court, and the sum awarded was reduced to $10,510.86. For this sum, with costs, judgment was entered by the complainant and the defendant appealed to this Court.

POINTS FOR APPELLANTS.

I.

The Court below erred in sustaining the report of the Master in finding, from the evidence before him, that the defendants sold during the six years over which the accounting extended, 11,244, or any other definite number of grates, which infringed the complainant's patent.

1. The defendants sold for many years, prior to 1876, a widely known and successful stove called the "Stewart Cook." In 1869, and previously, they placed in this stove a grate known as the "Hathaway" or "Long Bar" grate, of which a specimen has been put in evidence by the defendants. It consisted of a main frame, in which were two inner frames, side by side, running lengthways of the main frame. The inner frame supported the cross bars, which formed the grate proper. When shaken, they vibrated, alternately, in the direction of their length, one sliding forward as the other went back. This grate was also capable of dumping.

ASSIGNMENT OF ERRORS.

The Circuit Court erred:

FIRST.--In overruling defendants' first exception to the findings of the Master.

SECOND.—Also in overruling defendants' second exception to the findings of the Master.

THIRD.—Also in overruling defendants' third exception to the findings of the Master.

FOURTH.—Also in overruling defendants' fourth exception to the findings of the Master.

FIFTH.—Also in overruling defendants' fifth exception to the findings of the Master.

SIXTH.—Also in overruling defendants' sixth exception to the findings of the Master.

SEVENTH.—Also in overruling defendants' seventh exception to the findings of the Master.

EIGHTH.—Also in overruling defendants' eighth exception to the findings of the Master.

NINTH.—Also in overruling defendants' ninth exception to the findings of the Master.

TENTH.—Also in overruling defendants' tenth exception to said findings.

ELEVENTH.--Also in overruling defendants' eleventh exception to said findings.

TWELFTH.--Also in overruling defendants' sixteenth exception to the findings of the Master.

The witness, Walter B. Warren, on page 103, testifies as to the prior state of the art, and in his testimony describes what is called in the evidence the "Hathaway" grate.

Question 200. "Were grates in stoves and grates "in cook stoves a well known device prior to 1869?

"Ans. Yes, sir.

"Q. 201. And prior to 1872, of course?

"Ans. Yes, sir.

"Q. 202. Were grates used in cook stoves, con- "sisting of a frame, with transverse bars running "across from one side of the frame to the other, "prior to 1872 a well known device?

"Ans. Yes, sir.

"Ques. 203. Were grates also used with two "vibrating frames, one on each side, which con- "tained transverse bars?

"Ans. Yes, sir.

"Q. 204. The grates in use in which the trans- "verse bars on each side of the grate could be made "to vibrate alternately by vibrating a central bar, "or pivot—made to vibrate horizontally—made to "alternately vibrate in a horizontal plane by vibrat- "ing a central bar?

"Ans. They were."

This Hathaway grate, as well as the Keep grate, was put in evidence at page 69 of the record (fol. 124).

2. The facts show that the course of business adopted by the defendants, with reference to these grates, was as follows:

For many years prior to 1869, the defendants, as above stated, made and sold a stove called the "Stewart Cook," containing various kinds of grates. In 1869 they introduced into those stoves a grate called the "Hathaway," and which they used exclusively up to 1873. The complainant, Mr. Keep, was then in the employ of the defendants, superintending the manufacture of the Stewart stoves, and in 1873 he took out patent No. 139,583, for an im-

proved grate. The defendants made and sold this grate to a considerable extent, but, as the evidence showed, *they continued to make and sell the Hathaway grate at the same time.* This accounting only relates to grates that were sold separately from stoves, as "repairs." It is very clearly and conclusively shown by the defendants' witnesses that the grates were sold upon orders, copied into the sales book. The usual abbreviation for a grate for a Stewart stove was "D. G. S.," meaning "Dumping Grate, Stewart." Prior to 1873, when the order was "D. G. S.," the defendants would supply a Hathaway grate, as they manufactured no other that would answer the description. But during, and after 1873, upon such an order they would sometimes send the Hathaway grate, and sometimes send the Keep grate. If the order mentioned the kind of grate, it would be complied with. For instance, the orders were sometimes "D. G. S., 1869," which meant the Hathaway grate. Again, they were sometimes "D. G. S., 1873," which meant the Keep grate. But ordinarily the order was for "D. G. S." without any date, and then it was impossible to tell from the books which kind of grate was sent, as they kept both kinds of grates in stock, and when the order did not designate the grate, would send the one of which they had the most on hand, or which was most convenient. The evidence upon this point is very clear and conclusive, coming from one of the members of the firm, who was also the manager of the business, and from the clerk, whose business during all these years was to ship these grates when the orders were received. Mr. Walter P. Warren, one of the defendants, and partners in the firm, says, at folio 178:

"Ques. 208. It has been proved that between "February, 1878, and January, 1882, you sold a "large number of grates separately from the stoves; "what were the grates, sold separately from the "stoves during that time, and what were they sold "for?

"Ans. They were sold for the use of the Stewart "stoves that had been made under our contract "with Mrs. Stewart, and they were of the Stewart "and Keep pattern.

"Q. 209. You mean by that that they were what "has been called the 'long bar?'

"Ans. Long-bar and short-bar grate.

"Q. 210. During that time did you sell a large "number of the long-bar grates, as well as the "Keep grates?

"Ans. We did."

Mr. L. B. Drake was called by the defendants, and upon this point testified as follows (fol. 97):

"Q. 3. What was your occupation with Fuller, "Warren & Co. from 1869 to December 31, 1881?

"Ans. I was timekeeper and *shipper* from 1869 "to 1881, when I became assistant superintendent.

"Q. 4. Do you know what is called the *Keep* "grate?

"Ans. Yes, sir.

"Q. 5. Do you know what is called the long-bar "Stewart grate?

"Ans. Yes, sir.

"Q. 6. And the two-bar gate?

"Ans. Yes.

"Q. 7. What other grates besides the last two "named did Fuller, Warren & Co. make in 1869?

"Ans. There was the Gardiner, the two-bar "grate, the short-bar grate and wood grates.

"Q. 9. Did you continue to make and sell these "grates from 1869 to December 31, 1881?

"Ans. Yes, sir."

Again, at folio 102, the same witness says:

"Q. 59. Have you examined the books of Fuller, Warren & Co., which were in the possession of Mr. Keep, and from which he made those examinations, and did you find anything upon them which would enable him to determine what those grates where, whether long-bar or short-bar, or what they were?

Ans. In some instances; as a general thing the books don't show.

Q. 60. What is the fact generally?

Ans. They are marked as 'D. G. S.' grates.

Q. 61. 'D. G. S.' grates would include what kind of grates?

Ans. Either the long or short-bar grate.

Q. 62. The long-bar grate was not the Keep grate?

Ans. No, sir.

Q. 63. It was a grate which would fit either of those stoves?

Ans. Yes, sir.

Q. 64. So you can't tell from the books whether the grates named in the interim stated in that question, were long-bar, short-bar or Keep, or what kind of grate?

Ans. No, sir, not positively.

Q. 65. All the grates which passed through your hands, as shipper, were grates sold by the firm as repairs, wern't they?

Ans. Yes, sir.

Q. 66. You took no account of the grates made for stoves, which were sold in stoves?

Ans. No, sir.

Q. 67. So that all the grates which passed through your hands were grates sold for repairs?

Ans. Yes, sir.

Q. 68. In how many instances, if you remember, was there any designation of grates occurring through that period, by which you could distinguish what kind of grates were sold?

Ans. I couldn't tell exactly. I found quite a number through the books, where they were called '73 and '69 grates.

Q. 69. It was not the general practice to so designate them during that period on the books?

Ans. No, sir.

Q. 70. It would be impossible for any person to tell whether they were Keep grates, or what they were?

Ans. Yes, sir.

Q. 71. You know other grates were sold besides the Keep grate, during that time, largely?

Ans. I do."

In several of the following questions, the witness states that at the different periods mentioned by Mr. Keep he could not tell whether the grates were Keep or Hathaway grates, and, in his opinion, nobody could.

At folio 107 the following question was asked this witness on cross-examination:

"x-Q. 106. Give me your best judgment as to the number shipped in any one year while you were shipper?

Ans. Of which grate do you speak?

x-Q. 107. I mean the Keep grate.

Ans. I couldn't give any idea, because we shipped both kinds; we kept the long-bar and short-bar grates in stock, and some parties had one, some had another; sometimes, if we were out of one, we would replace the long-bar with the short-bar, and if out of the short bar we would send the long bar in place of it, so it would be almost impossible to make any kind of an estimate."

Again (fol. 113):

"x-Q. 162. All the grates you saw on the books bore some mark?

Ans. Yes, sir; but they were marked 3¼, 4½ and 5½, and they were marked D. G. S. grate; except occasionally, we would find them marked '73 or '69 pattern."

So that the testimony of this entirely disinterested witness is that during all this time he filled the orders that were received for grates, and that the orders, as found on the books, are for "D. G. S., 1869," meaning the Hathway grate; "D. G. S., 1873," meaning the Keep grate, and "D. G. S.," without date, which last orders might be and were

filled by sending either style of grate; that he was unable to tell from the books which style was sent under an order for "D. G. S.," without date, and that he thought nobody else could tell and knew of no way by which that fact could be ascertained.

3. There was no witness for complainant who spoke to this point except the complainant himself. He testifies as to his relation with the defendants as follows:

(Fol. 66.) "Q. 2. How long have you been engaged in the stove manufacturing, and if you have been engaged in the manufacturing of stoves, in connection with defendants, you may state how long, between what dates, and in what capacity?

Ans. I have been thus engaged for nineteen years, but with the defendants from June 1, 1865, until January 1, 1876, *as superintendent of the manufacturing of the Stewart stoves*, under an agreement with the defendants, the Stewart estate and myself, my compensation being paid by the Stewart estate; *I superintended the manufacture of these stoves at the works of defendants*, who were during that time manufacturing such stoves, under an agreement with the Stewart estate."

It will be perceived, that Mr. Keep had nothing to do with the books, nothing to do with the sales of grates, and nothing to do with the shipping. His duties were confined to superintending the manufacturing of the Stewart stoves, by the defendants. He does not, however, hesitate to swear positively as to the number of Keep grates sold by the defendants, and this is his statement, based upon the following theory:

He has examined the books of the defendants, which were produced at his request, and he renders a statement, in which he assumes that *all* the "D. G. S." grates, sold by the defendants, except those marked 1869, were grates of his

own invention. He says, in substance, orders for "D. G. S., 1869," were filled with Hathaway grates; orders for "D. G. S., 1873," were filled with Keep grates, and orders for "D. G. S." without any date were also filled with Keep grates. Now, the only way in which *he could know this fact* would be by finding an order for a quantity of D. G. S. grates upon the books of the defendants, and personally ascertaining, how the order was filled. He does not pretend to have done this in a single instance, and was not connected with the defendants, and only occasionally called at the foundry during the whole period of this accounting, from 1876 to 1882. He thus stated at folio 242:

"x-Ques. 181. Mr. Keep, when did you quit the employ of the defendants?

Ans. December 31, 1875.

x-Ques. 182. Where have you been in business since?

Ans. Six years in the City of Troy, and for the past two and a half years in the City of Detroit, Michigan.

x-Ques. 183. Since December 31, 1875, you have had no special acquaintance with the defendants' business, have you?

Ans. *Except what I gained from the books, and from my contact with their customers, as I was on the road to sell my own goods.*

x-Ques. 184. Since December 31, 1875, you have had no occasion or opportunity to examine the defendants' books *until they were placed in your hands in this accountimg*, have you?

Ans. No, sir; I have not.

x-Ques. 185. And have you been inside of the defendants' works since that time to any extent?

Ans. Not very often.

x-Ques. 186. Occasionally?

Ans. Yes, sir."

It is clear, therefore, that he had not examined the defendants' books covering the period from 1876

to 1882 until he examined them in this accounting. He then found, as I have stated, that the entries of sales of grates were "D. G. S., 1869," "D. G. S., 1873," and "D. G. S." without date. The whole basis of the Master's finding, as to the number of infringing grates sold, rests on this statement of the complainant himself that the letters "D. G. S." upon the defendants' books *necessarily* and *always* meant a Keep grate. Yet it was shown by his own testimony that he did not know, could not know, and that it was *impossible* for him to know, whether this statement was or was not true. Defendants' counsel, upon cross-examination, endeavored to find out upon what possible ground he rested this statement, with the following result. He had already testified as follows (fol. 195):

"Ques. 112. Then he (Mr. Drake) states in answer to question 70 that it would be impossible for any person to tell whether they were Keep grates or what they were; is that so?

Ans. It would be impossible for an expert who was not acquainted with the business of the defendants to tell, but any one acquainted with their business, *and knowing what their abbreviated entries mean*, would know."

It is fair, therefore, to conclude that the sole knowledge of Mr. Keep, as to what grates were sold, was based on his understanding of these abbreviated entries.

He testified at folio 243:

x-Ques. 187. "You stated on your redirect-examination that the letters 'D. G. S.,' as applied to grates, when found on the defendants' books, meant the Keep grate of 1873; how do you know that those letters invariably referred to the Keep grate?

Ans. *Because I know that is the name that the Keep grate was designated by by the firm.*"

But there is no question that the Hathaway grate

had been designated, in that way, by the firm ever since 1869.

Again, cross-question 188: "The letters mean the dumping Stewart grate, don't they?

Ans. They mean that the grate was a dumping Stewart grate; that was the name of the grate used by the defendants, in sending out grates.

x Ques. 189. The letters 'D. G.' mean dumping?

Ans. 'D' is the first letter of the word 'dumping,' and 'G' is the first letter of the word 'grate.'

x-Ques. 190. Do you think 'D' means dumping, 'G' means grate, and 'S' means Stewart?

Ans. Yes, sir; all taken together, it was the name of that individual grate."

Again, folio 244, x-Ques. 193. "If the book-keeper of the defendants says, that by the letters 'D. G. S.,' he meant another grate than the Keep grate, can you deny it?

Ans. I should deny it.

x-Ques. 194. You know what he meant better than he knows himself, is that so?

Ans. I don't think he would deny it in that way.

x-Ques. 195. That is not the question; suppose he should state it?

Ans. I know what that meant; that is all there was of it.

x-Ques. 196. You know what you think it meant?

Ans. I know this thing, that a grate ordered as a D. G. grate for a Stewart stove would always bring a Keep grate. I never knew it to fail, I will say."

This last answer is simply stating that he *knows a thing because he knows it.* And, considering the fact that he was not in any way connected with the defendants, during the whole period of this accounting, it is a most impudent and preposterous statement, and ought not to be believed by any court, in face of the positive testimony of a disinterested witness. Moreover, all the probabilities are in favor of the defendants' position. A large majority of these grates were furnished for the 3½, 4½ and 5½ Stewart stoves. None of these were made after 1876, and

they all had the Hathaway grate when originally sold. The presumption that the same grate which was originally in the stove would be ordered, and that such grate would be supplied by the defendants, is certainly very strong. But it is sufficient to say that Mr. Keep, according to his own admissions, was swearing to a fact, which is not only directly contradicted by a man who *did* know, but of which it was simply impossible that he should have personal knowledge.

The learned Judge at the Circuit found some difficulty in believing this testimony, as appears from his opinion, at folio 271, but he supports the decision of the Master, because he says that the latter official had the privilege of hearing Mr. Keep testify, instead of reading the testimony from a printed book. While this consideration would have some weight in a case of really conflicting testimony, it is difficult to see how it applies to this case. The fact that the Judge sees and hears the witnesses may have some effect upon the credibility of the testimony, but it can hardly be said to make up for an entire failure of proof. The principal objection to Mr. Keep's testimony is not that the facts in themselves are incredible, or that he is contradicted by other witnesses, but that by his own admissions he was testifying in the most positive manner to a fact of which it was impossible that he should have any personal knowledge. The fact that the Master heard and saw him did not go very far to explain how he knew that the letters "D. G. S.", which he admits meant "dumping grate, Stewart," and nothing else, always meant a grate made under the Keep patent of 1873. The only explanation he gives is that he understood what "the abbreviation meant," but in the first place we know what it meant, the Court knows what it meant as well as he does, and in the second place he swears to what he understood it meant, namely, a "dumping Stewart grate," and there is nothing either in the actual meaning or in the witness' understanding of

that meaning which confines the abbreviation to the Keep grate.

The learned Judge also says (fol. 272): "In many important particulars his (Mr. Keep's) evidence is corroborated." There were certain facts stated in the testimony from which the complainant's counsel drew various vague inferences as to the number of grates sold, and the titles by which the various grates were known, but, as I have said before, the whole award of profits made by the Master rests entirely upon the statement of the complainant himself, that the letters "D. G. S." upon the defendants' books meant a dumping Stewart grate of the complainant's invention. If that fact is not proved there is no proof upon which the judgment can be sustained, and *as to that fact*, there is not a particle of corroboration in the testimony.

II.

The Master clearly erred in awarding to the complainant the entire profits made upon the grates sold by the defendants, even though they were sold for repairs to stoves not originally fitted with the Keep grate. In the absence of evidence *tending to show how much of the profits was due to the use of the complainant's invention*, he should have reported for nominal damages only.

1. The rule of damages laid down by the recent decisions of the Federal Courts, in this class of cases, does not admit of dispute. Where no *damages to the complainant* are proved (and none are proved in this case), he is confined to the profits made by the defendant, *from the use of the patented invention.*

Where the patent is for a mere improvement on

an existing machine, it is not sufficient to ascertain the profits on the whole machine, but the complainant must show, by competent, affirmative evidence, what portion of the profits was due to the particular invention secured by the patent in suit.

The Court is more familiar with these principles than I am, but to refresh its recollection, I cite some of the more recent cases.

Blake *v.* Robertson, 94 U. S., 728.
Conwood Patent, 94 U. S., 695.
Black *v.* Thorne, 111 U. S., 122.
Garretson *v.* Clark, 111 U. S., 120.
Dobson *v.* Hartford Carpet Co., 114 U. S., 439.
Calkins *v.* Bertrand, 8 Fed. Rep., 755.
Maier *v.* Brown, 17 Fed. Rep., 736.
Reed *v.* Lawrence, 29 Fed. Rep., 915.
Fay *v.* Allen, 30 Fed. Rep., 446.
Tuttle *v.* Gaylord, 28 Fed. Rep., 97.

2. But the Master found that this invention was taken out of the general rule, by the fact that the patent was for the "entire grate," and, therefore, the complainant was entitled to the whole profit made on any grate that infringes the patent.

This position of the Master was apparently founded upon an answer of the complainant at folio 72, Q. 20: "State, if you can, whether or not the Patent No. 139,583, on the said Keep grates, is for the entire grate, or for only a portion of the grate? A. *The patent is on the entire grate; it is one entire device, and all covered by the patent.*" Mr. Keep swears to the fact and the law of the case, with equal facility, and the master, having the privilege of "seeing and hearing" him, was, according to the theory of the Court below, justified in accepting this answer as correct. The Judge at the Circuit in his opinion, sustains the master, at folio 275 of the Record, in which it places its decision squarely on the ground that the grate was made and sold *separately from the stove.* It seems

to me that the learned Court has mixed up two considerations. It is quite true that if the grate had been sold with the stove, it might be more difficult to ascertain what portion of the profits of the transaction were due to the grate. It is not, in my judgment, true that the complainant is entitled to the entire profits upon the grate, in one case more than the other. The learned Court endeavors to bring this case within the rule, that where an entire new machine or article of manufacture is invented and patented, the whole of the profits made by the infringement may be recovered. I have found the rule nowhere stated more clearly than in the case of Maier *v.* Brown, 17 Fed. Rep., 736, where Judge Brown says: "Thus if one discovers a new "composition of matter, such as gun cotton, "nitroglycerine or vulcanized rubber, or in- "vents some new machine, *such as the tele-* "*phone*, or some new article of manufacture, "such as barbed wire, or a new pavement, he "would obviously be entitled to damages, arising "from the manufacture and sale of the entire arti- "cle. Upon the other hand, if his invention was "limited to a particular part of a large machine, "such as the cut-off of an engine, the axle of a "wagon, or the seat upon a mowing machine, it is "equally clear that his recovery must be limited to "such profits as arise from the manufacture and "sale of the patented feature."

Now it is perfectly plain, that what the complainant invented in this case was, to use the language of Judge Brown, "a particular part of a large machine." It is quite true that the grates were sold separately from the stoves, but that did not make them a new machine. The distinction is, between a machine wholly novel, complete and operative, like the telephone, and a mere improvement upon an old machine, but Judge Cox concedes that this grate was an improvement on the stove, although sold separately.

3. But, more than this, the Master and the learned Court seem to have misunderstood the meaning of the expression "entire grate," as applied to this machine. The patent, they say, was for the entire grate. Why? *Because all the different parts of the grate were included in the patented combination*, but that is no proof that the entire grate was novel. On the contrary, it was, if anything, proof to the contrary. A combination, which includes all the parts of a particular device, or machine, must necessarily show a very narrow invention, and the principle that a patentee can recover all the profits made by the sale or use of the patented machine, because all the parts of the machine, *though old in themselves*, are included in the combination, cannot very well be sustained. For instance, Mr. Keep invented an improved grate. He would have had a perfect legal right to claim the grate, as described, in combination with the ash pit, the fire chamber and the exit flue of the stove substantially as described. Then, according to the rule adopted by the Court below, if the infringer sold the stove, the patentee would be entitled to claim the entire profits on such sale, because all the parts of the stove were included in the combination. But, considering the grate alone, what novelty was there in the invention, and what profits was he entitled to recover? A stove grate is in no sense "a new article of manufacture." It is as old as the primeval hills, and from time immemorial has consisted of a perforated iron platform, which supports the fuel in a stove, and through the apertures of which the air enters the fire, and the ashes fall. I do not say that human ingenuity may not produce a new article of manufacture which will perform the same office, but it is obvious that so long as the device is, essentially, a perforated iron platform, supporting the fire and allowing air to enter and ashes to fall through its perforations, it is not a new article of manufacture, though its construction is somewhat different from what has been used before.

This grate of Keep's consists of a main frame supporting a central bar, on which cross bars leading from side to side of the grate were pivoted loosely, so that their ends would vibrate in the direction of the length of the grate. The cross bars would move to shake down the ashes, and the grate would dump. What was there new about this? Shaking and dumping grates were in common use before Keep's invention. The main frame was old. Centre bars were old. Cross bars, with apertures or spaces between them, were old. Short cross bars on each side of the centre bar, vibrating alternately, that is, one side going forward as the other went back, were found in the Hathaway grate. All that was new in the Keep grate was a new arrangement of the old centre bar and the old cross bars, by which the cross bars were pivoted on the centre bar, and would rock on such pivot towards and from the ends of the grate. All Keep did was to give this new motion to the cross bars. The grate was not a new article of manufacture, it was not a new machine, it was an old and well known part of an old and well known machine, and the so-called improvement was of the slightest character. The burden was upon the complainant, under these circumstances, to show the proportion of profits due to the use of his improvement.

4. It is true that the learned Judge, in his decision, remarks, at folio 274: "There is a clear distinction between an improved grate and an improvement on a grate." I fear that I am not quite able to appreciate this distinction, having heretofore been of the impression that the result of making an "improvement on a grate" is an "improved grate," and it seems a very nice distinction upon which to found a judgment of twelve or thirteen thousand dollars; but I suppose what the Judge really means, is this: That if you make a slight change in the arrangement of the parts of the grate, and claim simply that change, without refer-

ence to anything else, it is an improvement on a grate. While if you claim in the same combination, the remaining parts of the grate, it is a claim for an improved grate. But assuming this distinction to exist, it can have no bearing upon the question before the Court, because, in each case, the real question is, *what was new with the patentee*, and what benefit did the infringer derive from the use of such new invention? The invention in either case must necessarily be the change in the old arrangement, whatever it was.

5. The learned Circuit Judge was under an entire misapprehension as to the rule under which the entire profits realized from the sale of an infringing machine are given to the owner of the patent infringed. Such profits are not to be given because all the separate parts of the machine are claimed in a single combination. Such a rule, in many cases, would make the infringer liable for the same profits many times over, for there might be patents upon the separate elements and upon the subcombinations, upon which the infringer would also be liable.

The test is this: *Is the invention so novel, the mode of operation so original, the advance in the art so great*, that it can fairly be said that *the whole commercial value of the machine is due to the invention?*

I have never seen the true rule more carefully or more ably stated than in the case of *Mocher* v. *Joyce* (2 Circuit Court of Appeals Rep., 322).

Every word of the opinion applies with full force to this case.

See, too, Crosby Valve Co. *v.* Consolidated Safety Valve Co., 141 U. S., 454.

To say that this grate of the complainant's was a new machine, in the sense that the *telephone* was a new machine, sounds like a burlesque. It was neither a complete machine nor a complete article of

manufacture. It produced no result until it was placed in a stove, and then what was its mode of operation, and what did it do? It supported the fire; it permitted air to reach the fire through its apertures; it "shook," to dislodge the ashes and let them fall through it; "dumped," to let the cinders and refuse fall into the ash pit. Thousands of grates had done all this before the complainant was born. He made a slight change in the arrangement of the cross bars, and there is no proof of the value of this change, or that it was of any value to the defendants. *That the whole market value was due to this invention* cannot be pretended in face of the undisputed fact that during the whole time of accounting defendants *sold another grate, for the same stoves, at the same price, and for an equal or greater profit.*

III.

In any event, whether the invention covered the whole grate, or only a slight change in the arrangement of its component parts, the rule of damages was, the advantage which the defendants had derived from the manufacture and sale of this grate, over that which they would have derived from the manufacture and sale of any other grate, which they were free to make and sell, and the proof is clear and undisputed that no such advantage existed.

1. The defendants were making and selling the "Hathaway" or "Long Bar" grate, long prior to 1873, and using them in their Stewart stoves, the same stoves to some of which the Keep grate was afterwards applied. It is conceded by all the witnesses, that the defendants kept these Hathaway grates in stock during the whole period covered by

the accounting, and the evidence is substantially undisputed (in spite of the assertions of the complainant, based on nothing but his own audacity), that these Hathaway grates were, during the whole time, delivered upon orders for D. G. S. grates, without date, which was the way in which they were first ordered, prior to Keep's invention.

Defendant Walter P. Warren testifies as follows, at folio 179:

"Q. 210. During that time did you sell a large "number of the long-bar grates, as well as the "Keep grates? A. We did.

"Q. 211. Did you sell the Keep grates during that "time for any greater price than that for which the "long-bar grates for the Stewart stove were sold? "A. We did not.

"Q. 212. You charged and received the same "price for each kind of grate? A. Yes, sir.

"Q. 213. In your judgment, had the Keep grate "any greater market value than the long-bar "Stewart grate? A. It had not.

"Q. 214. Which was the most expensive grate to "make; which cost the most? A. The Keep "grate"

So it appears that during the whole period of this accounting the Hathaway grates were sold side by side with the Keep grates; that they cost less than the Keep grates, and that the same price was received for them. It follows, therefore, that there was no advantage derived by the defendants from the manufacture and sale of the Keep grates above that which they would have derived had they manufactured and sold nothing but the Hathaway grates during that time. And it is altogether improbable that they would have made or sold a single Keep grate had they known that they would be charged as infringers for doing so, being able to derive at least as much advantage from the manufacture and sale of the Hathaway grate.

2. It necessarily results from these facts, undisputed as they are, that the duty of the Master was to report in favor of the complainant for nominal damages only.

This rule was first laid down in *Mowry* v. *Whitney*, 14 Wallace, 620, where it was applied to a process. In *Littlefield* v. *Perry*, 21 Wallace, 205, it was applied not only to machines, but to *stoves*, and that has since been the rule in all the Federal courts.

Turrill *v.* Ill. Central R. R., 2 F. R., 912.
Maier *v.* Brown, 17 F. R., 736.

And as I have stated before, so far as the rule now discussed is concerned, it can make no possible difference whether the defendant is entitled to the profits upon the "entire grate" or not. In either case, the profits must be measured by the advantage which he has derived from the sale of the infringing device over what he would have derived from the sale of any other article of the kind which he was free to make and sell. That *advantage* must be ascertained before the question of proportioning the profits can arise, and inasmuch as it appears, affirmatively, in this case, that the defendants could have derived at least the same advantage from making and selling the Hathaway grate, there is no basis for an estimate of the profits due to the complainant's invention.

3. The Judge at the Circuit, in his decision, does not discuss this point, but seems to think it cannot arise, in a case where the patent is for the "entire grate," but he does lay down the following very curious proposition of law (fol. 274):

"The defendants question the novelty and utility "of the invention, and seek to limit the construc-"tion to be placed upon the claim by references "not now before the Court. Such questions cannot "be considered. *They are merged in the decree.* "The Court, apparently without much opposition

" from the defendants, decided the patent valid *in* " *its entirety* as to each and all its claims, and that " the defendants were infringers, having sold the " identical thing covered by the patent. This decree " cannot be questioned here."

I am unable to see what the learned Judge meant by references " not now before the Court." The only reference upon which we sought to limit the construction of the patent was the Hathaway grate, which was before that Court, and is now before this Court. It is plain that in the judgment of the learned Court the decree was' not only conclusive as to the validity of the patent, and the infringement, *but precluded the defendants, upon the accounting, from questioning the broadest possible construction that could be given to the claims of the patent.* That is, *it decided, not only that the combination was novel, but that all the elements of the combination were novel.* It must have held, therefore, that proof of the prior state of the art, for the purpose of narrowing the claim, or confining the complainant to what he actually invented, was inadmissible, and for that reason it could not take into consideration the fact that the defendants could have derived an equal advantage, from the sale of grates, which were old in the art.

It is a little difficult to see, upon such a view of the law as this, where the courts have obtained the rule that the measure of the complainant's right to profit depends upon the advantage which the infringer has derived from the use of the invention, over what he might have derived from the use of another device, which was open to him or the public. If the judgment in the main case settles all those questions, and the defendant cannot, upon the accounting, prove the state of the art, with a view of confining the patentee to his actual invention, it is difficult to see how such a rule can exist, or if it exists, how it can be carried into effect. It seems plain that the learned Judge at the Circuit entirely misapprehended the rule.

IV.

The Court below erred in sustaining the Master's report, for the reason that no allowance appears to have been made by the Master for *manufacturers profits.* The complainant, who was the only witness upon that point, estimated the profits by deducting the actual cost from the selling price, with no allowance whatever for manufacturers' profits, or the cost of conducting the business. The duty of a complainant in a case of this character is briefly stated by this Court in the very recent case of *Keystone Manufacturing Co.* v. *Adams* (not reported):

"It is competent for a complainant, who has es-
"tablished the validity of his patent and proved an
"infringement, to demand, in equity, an account of
"the profits actually realized by the defendant from
"his use of the patented device; thatt he burden of
"proof is on the plaintiff; that where the infringed
"device was a portion only of defendant's machine,
"which embraced inventions covered by patents
"other than that for the infringement of which the
"suit was brought, in the absence of proof to show
"how much of that profit was due to such other
"patents, *and how much was a manufacturer's*
"*profit,* the complainant is entitled to nominal
"damages only."

In this case it seems to me that the burden is on the plaintiff of separating the profits due to the invention from the manufacturers' profits, but no such attempt has been made.

The judgment should be reversed and the Court below should be instructed to enter a judgment for nominal damages.

ESEK COWEN,
Of Counsel for Defendants.

Supreme Court of the [illegible]

No. [illegible]

JOHN HOBART WARREN, [illegible]
WALTER P. WARREN, [illegible]
W. FULLER, [illegible],

vs.

WILLIAM J. KEEP, Appellee.

BRIEF FOR APPELLEE.

NELSON DAVENPORT,
COUNSEL FOR APPELLEE.

SUPREME COURT of the UNITED STATES.

NO. 350.

JOHN HOBART WARREN, GEORGE A. WELLS AND WALTER P. WARREN, SURVIVORS OF JOSEPH W. FULLER, DECEASED,
Appellants and Defendants,
vs.
WILLIAM J. KEEP,
Appellee and Complainant.

BRIEF ON BEHALF OF APPELEE.

STATEMENT.

The appeal in this case is from a judgment rendered in the Circuit Court of the United States for the Northern District of New York, upon the decision of Judge Coxe confirming the findings of the Master, after having amended such findings in two respects.

The action was brought in said Court for the Northern District of New York by the appellee against the appellants, in 1881 upon several Letters Patent, all relating to stoves, water backs or grates, viz.:

Letters Patent No. 90,756, June 1, 1869, Flue plates.
Letters Patent No. 90,850, June 1, 1869, Hearths and Doors.
Letters Patent No. 121,876, Dec. 12, 1871, Water Backs.
Letters Reissue No. 4,386, May 16, 1871, Ash Pans.
Letters Reissue No. 8,685, Oct. 5, 1875, Design for Stoves.
Letters Patent No. 139,583, June 3. 1873, Grates.

Under the consent and stipulation of John B. Gale, Esq., defendants' counsel, a decree was entered in the Court below March 20, 1883, declaring and adjudging the validity of said several Letters Patent, and that said defendants had infringed said patents in the manufacture and sale of stoves, water backs and grates, and referring it to John M. Landon, Esq., one of the masters of the Court, to take and report an account of the profits derived by said defendants from the infringements, also of all damages sustained.

The Master filed his report June 17, 1889, in which he disallowed all claims for damages and profits arising from the sale of Flue plates, Patent No. 90,756, and Hearths and Doors, Patent No. 90,580, and Ash Pans, Patent Re-issue No. 4,386, and Designs for Stoves Re-issue No. 8,685, thus eliminating from the case all the Letters Patent involved in the suit, except Patent No. 121,856 for Water Backs and No. 139,583 for Grates.

He also disallowed all claims for damages and profits arising from the sale of water backs and grates which had been sold in and with stoves, thus striking from the account every one of the several different devices covered by the said six Patents which had been sold in and with a stove.

One hundred and forty-four water backs had been sold by the defendants, not in or with stoves, but as separate articles, and the Master reported (p. 23) that the complainant was entitled to recover $225.12 profits received therefrom, and to this finding the defendants have not excepted.

The Master also reported (p. 26) that the defendants had derived $575.26 profits from the sale of infringing grates at their retail store in Troy, to which no exception was filed; so that we have $800.38 uncontested.

The Master also found and reported that the defendants had sold a certain number of grates which infringed said

Patent No. 139,583, and as separate and independent articles, and had realized therefrom profits amounting to $11,363.54, including the uncontested items.

The only question, therefore, to be considered by this Court are such as relate to the profits derived by the defendants from the sale of the infringing grates.

The Court below sustained the 12th and 14th exceptions, on the ground that the evidence of the sale of 400 grates at defendant's retail store, between January 1 and July 1, 1879, and of 513 at the defendant's branch houses, was insufficient, for this reason, deducted these 913 grates from the Master's findings.

It appears, therefore, that the Master disallowed all claims under the several patents, except under the water-back patent (not excepted to) and the grate patent, and then eliminated from the grate account every grate which had been sold in or with a stove, and that then, the Court struck from the Master's findings every grate of which there was not the most absolute and unmistakable proof of sale and realized profits by the defendants; thus reducing the plaintiff's claim to $10,510.86, including the uncontested items. Now, the defendants' appeal to this Court, hoping to escape from the entire claim except the $800.38, uncontested.

The grate in question is designated by the witnesses, and in the testimony as the "Keep Grate." The defendants knew that it was covered by the Letters Patent No. 139, 583, and the defendant, Warren, admits it.

The defendants offered in evidence four samples of the infringing grates which they had sold, and it appeared that three of such samples had stamped in the iron, "W. J. Keep, Patent June 3, 1873;" or "Patented June 3, 1873," (p. 69-73.) Due notice of infringement is alleged, established and admitted by the defendants, (p. 39-85.) The infringement was deliberate and willful and commenced in 1873, (p. 60.)

POINTS.

I.

The decree herein was entered under the stipulation of the defendant's counsel, (p. 19 and 21) and adjudges the validity of the Grate Patent No. 139,583, and of each and every part thereof; also that the defendants in the manufacture and sale of grates had infringed each and every claim of said patent.

These questions, therefore, will not be reviewed by this Court, nor will any other question which is determined by the decree.

Pacific R. R. v. Ketchum 101, U. S., 289.
U. S. v. Babbit, 104 id 767.

II.

Such matters, only as are excepted to, and not settled by the decree, will be considered by this Court.

Medsker v. Bonkrake, 108 U. S., 66.

The several, and only exceptions taken by the defendants to the Master's findings all relate to grates, and may be resolved into two.

The first one is, in substance, that the Master reported that a certain number of infringing grates had been made and sold by the defendants, when he should have reported that there was no evidence before him from which he could ascertain how many.

The second one is, that the Master reported all the profits received by the defendants from the sale of such grates, when

he should have reported that there was no evidence before him from which he could ascertain what portion of the said profits was due to the patented part of the grate.

As to the First Exception we say :

1. It is conceded by the defendants that they made and sold the infringing grate, designated as "Keep Grate," but insist that the plaintiff failed to prove exactly how many, and, therefore, should recover for none.

On the hearing before the Master the defendants exhibited no account and rendered no assistance, but merely presented their books, under the order of the Court, and said, in substance, "Find what you can."

The data from which the Master made up his report as to the number of infringing grates made and sold by the defendants during the period fixed by the decree, and the cost of same, and the prices received for same, were taken from the defendant's books, and the condensed statement will be found on pages 23 to 27, inclusive, of the printed record.

The original memoranda of the entries in defendant's books of sales of these Keep grates, from which the condensed statements were drawn, was called for, on the hearing before the Master, by Mr. Gale, then counsel for the defendants (Ans. 109, p. 45), and were delivered to defendants' Superintendent, Mr. Drake, for examination and comparison with the books. Upon such comparison Mr. Drake with a black pencil drew a line across or marked "can't find" such entries on the memoranda or schedule made by Mr. Keep as Mr. Drake could not find (Ans. 186, &c., p. 63 & 64,) Then the same schedule was returned to Mr. Keep for re-examination and re-comparison, who, with a blue pencil, explained the items which Mr. Drake had marked, giving the pages of the defendants' books where the entries could be found. (Ans.

180, p. 144.) These re-examinations resulted in deducting 156 grates from the whole number. The original memoranda, marked "Schedule," are before this Court, and it will be observed that this schedule consists of 70 pages of cap paper covered with figures, pencil marks, references, explanations, &c.

From the claims presented by the plaintiff, and to sustain which he gave proofs, the Master disallowed all claims for profits derived by defendants from the sale of stoves which contained the several patented devices mentioned in the decree, including grates which had been sold *in or with stoves*, and only allowed the profits received by the defendants from the grates sold as separate and independent articles.

The report made by the Master the Court below characterized as a "conservative report," yet made it more conservative by striking from it 913 grates on the ground that the defendants' books did not show an actual sale of those grates.

2. The findings of the Master, concurred in by the Court below, after some amendments, based as they are upon a mass of testimony, conflicting, to some extent, as to the exact number of infringing grates made and sold, are, presumably, correct, and will not be disturbed by this Court, unless it clearly appears that some serious or important error in computing the number was committed.

This rule has been so thoroughly settled by this Court that we only add to the cases cited by the Court below.

Crawford v. Neal, 144 U. S. 588.
Farrer v. Ferris, 145, U. S. 132.

If any important errors were committed by the Master or by the Court below, the burden is upon the defendants to point them out, and it may be entirely unnecessary for the plaintiff to call the attention of the Court to the prominent

facts established, still, in the following 10 pages we give them briefly, and it will be observed that the chief contention of the defendants was, that as the books did not name the grates sold, in words, the "Keep" grate, the plaintiff could not tell by the letters and figures designating the grates on the books, that they were Keep grates.

The plaintiff concedes that his statement drawn from defendants' books does not cover all the Keep grates made and sold by them during the period fixed by the decree, because only a portion of the books showing such sales were produced by the defendants (ans. 14, p. 35), but he claims that all the grates shown in the statement were Keep grates. In making up this statement from the books, he carried into it as Keep grates such grates as he found entered on the books as D. G. shaking grates, or D. G. S., preceded by a number, as 3½, 4½, 5½, &c., indicating the size of the grate, except where the entry was followed by "1869," or "long bar," or "wood grate."

On cross-examination Mr. Keep was asked to state fully the facts from which he testified in answer to Q 7 (p. 32) that the grates in that answer referred to Keep grates, and he answered that there were only three kinds of grates made, viz: the old wood grate, the two-bar grate of 1869 and the Keep grate, and that on the defendants' books the entries are wood grate, which designated the wood grate, D. G. S. grate 1869, and that the Keep grate was entered 3½, 4½, 5½, &c., D. G., Shaking grate (ans. 107, p. 44). These facts were within the knowledge of Mr. Keep. He had been engaged in manufacturing stoves over 19 years, and with the defendants over 8 years, and was thoroughly acquainted with their method of business in all its branches, and with their accounts and entries.

During the 8 years and to 1876 he superintended the manufacture of the Stewart stoves, made all the improvements and had the entire charge and direction of same. He invented the Keep grate and was well acquainted with all the grates made and sold by appellants, and with the

demands of the trade, and knew how the different kinds of grates were ordered and entered upon the books.

The defendants claim that the above specified entries upon the books do not always necessarily mean the Keep grates, but may mean some other grate, because they made a grate called the Gardner grate, also a long bar and a short bar grate, etc. In answer to this, we say that it is of no importance what names they now give to the grates sold, the only question being what the books show and what grates are meant by certain marks and entries thereon. The books do not show any grates called Gardner grates. It was an old grate made for the stove of 1851 (ans. 76, p. 41). Only a few were made (ans. 60, p. 51). It was not used in the stoves of 1869 or 1873 (ans. 142, p. 137), and it was not a dumping grate (ans. 141, p. 119), and therefore could not have been designated on the books in 1876 to 1882 as a D. G. S. grate, and was not so designated, in fact (ans. 194 p. 64). Neither do the books between the dates named, contain any entries of "long bar" or "short bar." The long bar Stewart grate was entered a "D. G. 1869" (ans. 68, p. 41). There was no grate called the "short bar" (ans. 71, p. 31). The only short bar grate was the Keep grate, but it was not called "short bar" (ans. 77, p. 41), but D. G. shaking grate, or D. G. Stewart S., or D. G. S., or simply D. G. (ans. 111, p. 114, and ans, 92, p. 129).

Whatever entries of grates may appear on the books, it is admitted by both parties that the only entries of grates examined, and the only ones carried into the statement in question, were the entries D. G. Stewart S., or D. G. Stewart, or D. G. S., or D. G., letters indicating a dumping and shaking grate (ans. 60, p. 55, and q. 162, p. 62, and ans. 111, p. 114), and Mr. Drake admits that the entry D. G. S. means either the long bar grate or the Keep grate (ans. 60, p. 55), so that it is conceded that the entries of grates D. G. S., or D. G , &c., mean the Keep grate, or the long bar. This grate, called by Mr. Drake the long bar grate, was sometimes called the two bar grate, and was the 1869 grate (ans. 94, p. 129), and was entered as D. G., 1869 (ans. 199, &c., p. 145). These statements

by both parties, therefore, established the fact that all the entries on the books D. G. S. and D. G., &c., which were carried into the statement, mean Keep grates, or 1869 grates.

The next question is: How many of them were Keep grates and how many of them were 1869 grates? The defendants refused to give any information on the subject, but contented themselves with the remark that "no one could tell;" but it is very evident that Mr. Drake was not as well acquainted with the grates and the way they were designated in the orders, and the meaning of the entries on the books, which correspond with the orders, as Mr. Keep, and he explains in answer to Q. 110, p. 114; "There can be no doubt as to which grate is referred to in the books; there are only three kinds of entries, one the grate marked D. G. Stewart S. grate; the second where this is succeeded by the figures "1873," and the third by "1869." In the first of these cases the Keep grate is always referred to where there is no "1873" or "1869" after it. In the second case, with "1873" after it, the Keep grate is always meant, and in the third case, with "1869" after it, as Mr. Drake says, the question might be doubtful, * * they sometimes shipped one and sometimes the other." In this answer (p. 114) Mr. Keep gives a reason for being able to tell what grates are meant by the entries D. G. S., &c., and the attention of the Court is particularly called to this answer.

Mr. Drake says that the books did not generally designate grates as "1869" or "1873," and that it would be impossible to tell whether the entry D. G. S., not followed by any figures, meant a Keep grate or a '69 grate, while Mr. Keep asserts that such entry, not followed by "1869," always meant a Keep grate. Mr. Keep, in the statement presented, omitted, or intended to omit, every 1869 grate, but Mr. Drake, in his examination and comparison of the items in this statement with the entries on the books, found quite a number of '69 grates which had been erroneously carried into said statement, as his marks with a black pencil on the Exhibit "Schedule" will conclusively show. On almost every page of 50

pages of this schedule will be found Mr. Drake's entry in black pencil, "69" or "1869," opposite a grate entry, clearly showing that Mr. Drake knew which entries meant the 1869 grate. Opposite to these marks made by Mr. Drake will be found Mr. Keep's comment in blue pencil, admitting Mr. Drake's correction or pointing out his error; 55 such entries will be found on those 50 pages. On account of these and other corrections there were deducted from the original statement 156 grates, so that it is quite certain that all the 1869 grates were eliminated from the statement.

The evidence shows conclusively that the defendants would not have shipped an 1869 grate unless specially ordered, in which case the entry on the books would correspond with the order. The 1869 grate was a short-lived grate, and damaged the reputation of the defendants (ans. 110, p. 114), and Mr. Lang testifies that the Keep grate was superior to the 1869 grate and would last longer (ans. 118 and 119, p. 131), and that the 1869 grate had serious faults and did not prove to be a success (ans. 134 and 135, p. 132), and the defendant, Mr. Warren, admits that the Keep grate was a more durable grate than the 1869 grate. (Ans. 269, p. 157).

From the foregoing it must be concluded that the entries D. G. and D. G. S., &c., not followed by a date, mean Keep grates, as found by the Master, but there are other facts which support this conclusion. Mr. Keep says: "I know that the grate ordered as a D. G. S. would always bring a Keep grate. I never knew it to fail." (Ans. 196, p. 145.) Mr. Lang, for 17 years in the employ of the defendants (ans. 6, p. 120) as a traveling agent and exhibting their stoves, and selling them to the extent of $50,000 worth per annum (ans. 68, p. 126), testified that Keep grates were sent on his orders for D. G. S. grates, and that the Keep grates were designated in his orders and in his instructions to agents as the D. G. S., or dumping grate (ans. 92, p. 129), and he further testifies that the figures "1869" designated the long or two-bar grate of 1869; that the D. G. grate was not issued until 1873, and that, therefore, D. G. did not mean the 1869 grate. (Ans. 94, p. 129).

There is further confirmatory evidence on this point. In the Exhibit marked "Defts' Cross-ex Circular." (the original to be presented to this Court under stipulation), which appears to have been issued by the defendants in 1878, there are four cuts of the Keep grate, two on the third page and two on the fourth page, as testified to by Mr. Warren (ans. 122, p. 99,) and as appears by the circular.

On the third page is the cut of a stove marked 1869 pattern, Nos. 3½, 4½ and 5½, and under this stove are three grates, viz: "Wood grate, 1869 pattern," and "Coal grate, Keep pattern," and "Coal grate, 1869 pattern," showing that the defendants advertised for the 1869 stove only the wood grate, the Keep grate and the 1869 grate, as testified to by Mr. Keep, and also showing that the long-bar grate was advertised, "Coal grate, 1869 pattern."

On the same page is a cut of another stove, which is the 1873 stove, N. C. This is shown by the numbers 7½, 8½ and 9, it being remembered that in 1873 the numbers designating size of stoves and grates were changed from 3½, 4½ and 5½ to 7½, 8½ and 9 N. C. or C. F. (Ans. 9, p. 33). Underneath this 1873 stove are three grates: "Dumping wood grate," and "Dumping coal grate," "Dumping coal grate, with long bar," and under these grates the words, "To fit stoves from 1873 to 1878." This confirms Mr. Lang's statement that no grates were called D. G., or dumping grates, until 1873, and also shows that the Keep grate was the only grate advertised simply as "Dumping coal grate," which was abbreviated to D. G., or D. G. S., &c., and also shows that the long-bar grate was advertised as "Dumping coal grate with long bar," which was abbreviated to D. G. S., or D. G., &c., 1869, because it is the same grate as called, near the top of the page, "Coal grate, 1869 pattern."

On page four of the circular is another cut of the 1873 stove—a C. F. (Close Front). Under this stove are two coal grates, readily recognized, the one on the left as the long-bar and the one on the right as a Keep, followed by the words, "Only a few of the above grates made for

No. 9 only." Under these words are cuts of two wood grates and a "Dumping coal grate. To fit all stoves from 1873 to 1878." This Dumping coal grate is readily recognized as the Keep grate, and is the only Dumping coal grate advertised as 7½, 8½ and 9, C. F., except "a few made for No. 9 only."

Now, it is evident from this circular that the D. G. grate was not known to the trade until 1873, and that after this time, or, at least, after 1878, customers ordering a D. G. grate meant a Keep grate unless they appended to the order "1869," or "long-bar," and this exactly accords with the testimony of Mr. Lang and Mr. Keep. The wood grate was always designated as a wood grate. (Ans. 138 and 140, p. 60).

There is still another fact which indicates that the entry of a D. G. grate means a Keep grate unless followed by the figures 1869.

Two special entries appear on the defendants' order, or sale book. In Sales Book No. 1, under date of March 16, 1876, is an entry, W. T. Crook, Rouse's Point, 3½, 4½, 5½ shaking grate, D. G., and an explanatory remark under the entry that "this grate is a new pattern, but it will fit." That is, fit the 1869 stove, clearly showing that the entry of a D. G. grate, standing alone, did not mean the 1869 grate, but the Keep grate. (Ans. 78, p. 43). On sales books under date of October 3, 1876, is the entry, Litch & Sautelle, Fitchburgh, Mass., 8½ Stewart shaking grate, and under that entry a memorandum stating that "we never made a two-bar grate for 8½ stove." This two-bar grate, it will be remembered, was the 1869 grate, and the order not being for a D. G. grate, that memorandum was made on the sales book to indicate that a D. G. 8½ grate was shipped on this order, again showing that the entries of D. G. grates did not mean the 1869 grate, but the Keep grate.

The circular marked "Dfts' Ex Circular," furnishes an additional key to the meaning of the entries D. G. S. and D. G., &c., grates on the books. The "special notice" at the foot of the fourth page of the Circular advises parties

ordering repairs to mention the date of patent, or any mark or lettering on the part wanted. Now, the defendants offered in evidence four grates as samples of the grates made by defendants, and Mr. Drake testifies (ans. 260, p. 69), that first exhibit is a 4½ D. G. short-bar grate, sold and marked on the books as a D. G. grate, and Keep grate; that the second is a 4½ D. G. long-bar, known as the D. G. long-bar, or 1869 grate; that the third is an 8½ short-bar, close front (C. F.) grate, and that the fourth is an 8½ short-bar, non-clinker (N. C.) grate.

On cross-examination he examines these four grates and testifies that the 1st Ex., the 4½ D. G. grate is marked "Patented June 3, 1873;" that the 2nd Ex., the 4½ 1869, is marked "4½, 69;" that the third Ex., the 8½ C. F. is marked "Patented June 3, 1873," and that the 4th Ex., the 8½ N. C., is marked "W. J. Keep's patent, June 3, 1873."

These marks, indelibly stamped into the iron grates, shown to be dumping grates, advertised to the public and notified the trade that all the 3½, 4½, 5½, 7½, 8½ and 9 grates were D. G. grates and of the 1873, or Keep pattern, unless marked "69."

Taking all the facts and circumstances produced, relating to the entries upon the books, it is evident, beyond any question, that the entries of grates upon the defendants' books as D. G. S., D. G., &c., mean the Keep grates, unless followed by the date, 1869, and, this being the fact, the correctness of Mr. Keep's statement on pages 33 and 34 of record, must be conceded. Mr. Drake, however, states that he could not find as many grates on the books as appear in Mr. Keep's statement. In that part of Mr. Keep's statement showing the sale of 9,124 Keep grates, Mr. Drake says that he found only 5,127. We do not propose to examine his statement in detail, because his testimony shows that his statement as to number is unreliable. He counted none that he, with his limited knowledge of the books, could not positively identify as a Keep grate. He admits that he did find entries of the sale of grates which he identified as Keep grates, but just how many he found he was not kind enough to state. That

he did not find as many grates and as many Keep grates as found by Mr. Keep was due to his own ignorance and negligence. Prior to 1881 or 1882 he was nothing but a time-keeper and shipping clerk for the defendants, and knew too little of their business methods, and of their books, and the meaning of the entries made by the book-keepers, none of whom were produced as witnesses. He did not count the Director grates (ans. 58, p. 55), conceded to have been the Keep grates, and did not examine the order books, nor the shipping books. No sales book from January to July, 1879, was produced, yet Mr. Drake ignored those six months, and made no effort to ascertain the number from other books. As an excuse for not having examined the order books, he pretended that it would have duplicated the grates, but if he had examined the order books as well as the shipping books for the purpose of verifying the sales books and supplying deficiencies therein, he would have made fewer blunders. The sales books for January, 1879, had been burned, and the order book for that month was examined by Mr. Keep to ascertain the number of Keep grates sold that month. Mr. Drake feared that the grates sold in January might have been shipped in February and appear on February sales book, so he did not examine the shipping books nor the order books. The fact is, that the January order books show that the January grates were shipped in January, as the date of shipment is recorded across each entry. (Ans. 121, p. 116). Drake included no grates for this month. He did not examine the shipping books to ascertain the number of grates sent out to agents, nor any books to ascertain the number sold at the retail store. He assumed that page 71 of the "Schedule" was a recapitulation of the 70 previous pages (ans. 200, p. 64), and says that the recapitulation doubled the number of grates that he was able to find, which is not remarkable, in view of his omissions, some of which are above given. He admits, however, that if he should deduct all the grates which he had erased and marked "not found" his account would agree with the sheets. (Ans. 222, p. 66). This is a gross error, because the sheets aggregate over 10,000 grates, as they show for themselves.

He testifies that he examined all the items and marked all he could not find on the Schedule, yet on pages 62, 63, 67, 68 and 69 are several thousand grates, and he did not mark a single one. He also testified that defendants had filled grate orders from one up to fifty (ans. 102, p. 58), yet he did not, on the sheets he examined, find a single order of 50, or near it, and must have concluded that Mr. Keep had missed all those large orders.

It is very evident, therefore, that no reliance can be placed upon the testimony of Mr. Drake as to the kind of grates made and sold by defendants, nor as to the number made and sold.

If the defendants had presented to the master a full and fair statement of the Keep grates sold, from the books, papers and records under their control, or within their reach, they would have shown more than 2,000 for every 100 grates which Mr. Keep has shown. The magnitude of their business proves it. One salesman (Mr. Lang) alone sold $50,000 worth of stoves per year. (Ans. 68, p. 126). The net profits of the retail store alone was $30,000 per year (ans. 15, p. 35). The amount of their wholesale business at their works and at their branch houses in three of our principal cities does not appear. Mr. Warren testifies that they sold from 12,000 to 15,000 1869 stoves before 1873, and over 19,000 Stewart stoves between that date and 1882. Mr. Drake testifies that the life of the grate is one year. The Keep grate was made to fit the 1869 and subsequent stoves, and was the most durable and best grate, so that they must have sold at least 25,000 Keep grates per year for the Stewart stoves alone, besides the large numbers they must have sold for the Director stove and for other stoves on the market, instead of the few thousand we have been able to find, unaided by the defendants. They declined to present any account or to give any information as to the number of Keep grates they had sold; pretended they could not tell; books burned, some of their book-keepers dead, entries not understood, &c., &c., contenting themselves with criticisms and doubts concerning certain small items which Mr. Keep had drawn from the entries in such

books of the defendants as he had been able to get. That Mr. Keep's statement, so far as it goes, is absolutely correct there can be no doubt, and the defendants undoubtedly congratulate themselves over their success in preventing larger discoveries.

III.

In answer to the second series of exceptions to the Master's findings, that the plaintiff was entitled to all the profits derived from the sale of the infringing grates, we say :

1. The cost of the infringing grates, and the prices at which the defendants sold them, and the amount of profits realized therefrom, as established by the evidence before the Master and found by him, they do not seriously question, but contend that, under the settled rule, it was the duty of the plaintiff to point out and to prove what part of the profits derived from such sales were due to the patented features of the grate, and that not having done so, he is entitled to nominal profits only.

Undoubtedly this is the rule in all cases where the infringer appropriates only a portion of a device which is entirely covered by the patent, or where he appropriates the entire device which is only partly covered by the patent.

This rule, however, has no application to the case at bar, because every feature of the infringing grate, and the grate as a whole, are covered by the patent, and made and sold by the defendants in its entirety, as an article of commerce.

2. The rule applicable to the facts in this case, well settled by this Court in numerous cases, some of which are hereinafter cited, award to the plaintiff the entire profits derived from the sale of the infringed grates.

The defendants by consenting to the decree herein adjudging the validity of each and every claim of the patent, and that the plaintiff is the inventor, and it appearing on the face of the patent that it is for the entire grate, are estopped from denying that the patent is for an entire device, and from raising any question under their second series of exceptions relating to separation of profits.

3. The patent on this grate—June 3, 1873, and No. 135,583, marked "Exhibit A"—contains eight claims, which we here insert for convenient reference :

First—"A stove grate provided with transverse bars, "which are capable of vibratory motion in a horizontal plane, "and of a semi-rotation in a vertical plane, upon or around "the centre of vibration, substantially as and for the purposes specified.

Second—"In a stove grate a series of transverse grate "bars suspended from or upon a central longitudinal support"ing bar, so as to be capable of horizontal vibration at their "points of suspension, substantially as and for the purposes "shown.

Third—"The connecting or vibrating bar E provided "with the openings e, in combination with the grate bar D, "provided with the curved spurs d''', substantially as and for "the purposes set forth.

Fourth—"In combination with a central, pivoted or sup"porting-bar, a shank so arranged that by vibrating its outer "end sidewise its inner portion shall communicate to the "ends of the lateral grate bars a vibratory motion in a con"trary direction, substantially as and for the purpose shown "and described.

Fifth—"The shank F, capable of the motion described, "and combining with the pivotal bar C, and the vibrating or "connecting bar E, substantially as and for the purposes "specified.

Sixth—"In combination with the bar C, provided with "the recess C′ and with the shank bar F, the lip C′′′′ secured "upon said pivotal bar and extending over said shank bar, "substantially as and for the purposes shown.

Seventh—"The pivoted end grate bars D′ provided with "the spurs d′′′′ in combination with the ends A′ of the bed-"plate, provided with the spurs a′, substantially as and for "the purposes set forth.

Eighth—"The hereinbefore described fire grate as a "whole, when its several parts are constructed and combined "to operate in the manner and for the purposes shown and "described."

It will be seen that the patentee describes fully and minutely every feature of the grate, and that the claims cover most completely every part and combination which make up the complete structure.

4. It has not been and cannot be claimed nor pretended that the infringing grates made and sold by defendants were not the identical Keep grates in every part, feature and line. They were cast from the Keep patterns, and stamped with his name and the date of his patent. They took nothing from the grate, and added nothing to it, but made and sold it in its entirety as a merchantable article.

It was an improved grate; a complete structure of itself, and was recognized by the trade and by persons thoroughly acquainted with all the grates on the market as an entirely new construction, and the Master finds that "This grate is a complete combination in itself. The parts and combinations described and claimed in the several claims in the patent constitute the entire device," (4th finding, p. 23), and the Court below concurs (p. 163).

5. The fact that these grates were made to be used in

stoves and furnaces, cannot affect the question of profits. They were not sold as improved stoves nor as improvement in a stove, but as an independent marketable article—an improved grate.

It was not an incident to any particular stove, but, as the evidence shows, was used not only in the Stewart stoves, but in the Rubicon, Rapidity, Director, Home Friend, the Golden Crown and Meridan stoves, and could have been used in any coal stove on the market.

6. In common with other patented devices, e. g., the Richardson valve in the Crosby Steam Gage case cited below, this grate has a specific purpose and use. Such grates and valves may surpass all other grates and valves, and may enhance the value, capacity, economy and durability of the stoves, ranges and furnaces and of the steam boilers and generators to which they may be annexed. They are not integral parts, but attachable devices, and may be made to fit all of the different kinds of structures to which they respectively pertain, and may be sold separately or with them, or as parts of them.

If such grate or valve be made or sold in or with and as a part of the device to which it pertains the infringer must pay only such part of the profits derived from the sale of the entire structure, as may be due to the patented part, but if such grate or valve is a complete combination of itself, and covered by the patent, and be sold as an independent marketable article, as in the case at bar, the infringer must pay the entire profits realized from the sale thereof.

This doctrine has been so well settled by this Court that we cite only the following cases:

Elizabeth v. Pavement Co., 97 U. S., 126.
Manufacturing Co. v. Cowing, 105 U. S., 258.
Hurlbut v. Schillinger, 130 U. S., 456.
Crosby Steam Gage Co. v. Valve Co., 141 U. S., 441.
Keystone Mf. Co. v. Adams, 151 U. S., 147.

7. It is not claimed that any part of this Keep grate is covered by any patent save the Keep patent, nor can it be claimed that the Keep patent does not cover every part and combination of this Keep grate, and the grate as an entire device, nor can itbe fairly claimed that the grate is an old device, or that some parts or combinations are old. It is too late to raise any question relating to novelty. The stipulated decree adjudges the validity of each and every claim of the patent, and that the plaintiff is the original and first inventor thereof.

8. The position taken by defendants in the Court below, that the Hathaway grate, which was open to the public, resembled the Keep grate and perhaps could have been sold to customers in place of the Keep grate, and that plaintiff is therefore not entitled to the entire profits, is unsupported by proof, and untenable. The demand was for the Keep grate, and whether the defendants could have deceived their customers by shipping to them some other grate than the one ordered, is mere conjecture. If they had done so it would have been even more disreputable and dishonorable than selling the infringing grate without the consent of the patentee.

The question is not what they might have done, or guess they might have done, but what, in fact, they did.

The Pavement Case, 97 U. S., 141.

9. It was not a part of, but the entire device, which the appellants made and sold, and not in or with a stove, nor as a part of a stove, but as an independent merchantable article, which could be attached to stoves and ranges of many different styles and patterns—an entirely new structure, every feature of which is covered by the patent.

Remove the patented features and there will be nothing left. This case, therefore, does not fall within the rule demanding a separation of profits, but within the rule which

requires the infringer to pay over the entire profits received from the sale of the infringing device, as laid down in the cases above cited.

We respectfully submit that no important error of fact or of law was committed by the Court below, and that the decree should be affirmed.

NELSON DAVENPORT,

Counsel for Appellee.